

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR No.4347 of 2018

Date of Decision:18.12.2018

Vinay Kumar

...Petitioner

Vs.

Smt. Preeti

...Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Sumeet Goel, Advocate,
for the petitioner.

Mr. Ankur Lal, Advocate,
for the respondent.

Amol Rattan Singh, J.

The short controversy in this revision petition is whether the Family Court at Faridabad has jurisdiction to entertain the petition filed by the respondent herein under Section 6 of the Guardians and Wards Act, 1890, by which she seeks custody of her children (a boy and a girl), aged about 4 years and 3 years respectively at the time that the petition was instituted before that Court on 09.10.2017, the petitioner herein being the father of the children, i.e. the husband of the respondent.

The petitioner resides at Mayur Vihar at Delhi with the respondent residing with her parents in Sector-21-B, Faridabad.

2. The background is that the petitioner and the respondent got married to each other on 19.02.2012 in Delhi as per Hindu rites and ceremonies, after which the respondent lived with the petitioner, and out of that wedlock the two children were born on 17.10.2013 and 27.11.2014

respectively.

It is the contention of the respondent in her petition that the petitioner herein (i.e. her husband) and his parents were not happy with the marriage and used to torture her, both mentally and physically, allegedly seeking more dowry; and when they did not listen to reason despite her parents intervening, eventually she returned to her parental home after, allegedly, the husband and his parents locked her in a separate room and did not provide food and threatened to kill her.

Thus, she is stated to have left her matrimonial home on 16.02.2017, after which she and her parents got FIR no.103 dated 24.03.2017 registered at Police Station NIT Faridabad, against the husband and his family, alleging therein the commission of offences punishable under Sections 498-A, 406, 323, 506, 34 IPC.

3. It is further alleged in the petition filed by the wife that she tried her best to meet her children and also sought their custody from the respondent which was refused, thereby leading to the filing of the petition, in which the first ground taken is that both the children being below 5 years, the mother is their natural guardian.

Other than that, the temperament and nature of the husband have been commented upon, to state that he is not a proper guardian for the children, with the wife and her parents in a better position to look after them.

4. The reply filed by the present petitioner (respondent before the trial Court) has also been annexed with this petition, a perusal of which shows that other than the usual preliminary objections, it is stated that the wife herself left the company of the petitioner, thereby deserting her children and therefore she is not entitled to their custody.

Further, in the reply on merits, it has been stated that the husband and his family also spent a large amount of money on the marriage, to the extent of Rs.50,00,000/-, and it is actually the wife and her family members who “are habitual of creating scene and used to pick fights on petty issues and that is the sole reason why this marriage could not get success”, whereas actually she was warmly welcomed into the family of the husband. Yet, she is stated to have become “habitual of leaving the matrimonial home” and eventually left it and lodged a false complaint with the police (at Faridabad) and before that she had also lodged a frivolous complaint at Police Station Pandav Nagar on 13.03.2014, with regard to the daughter “having been misplaced” by the husband and his family members, after which she also recorded a statement that she was safe and happy in her matrimonial home.

5. The petition under the Guardians and Wards Act having been instituted, alongwith the reply of the present petitioner (husband-respondent in that court), an application under Order 7 Rule 11 read with Section 151 of the Code of Civil Procedure was also filed, stating that in terms of Section 9 of the said Act, the Court at Faridabad has no jurisdiction to entertain the petition, the minor children admittedly residing at Mayur Vihar, New Delhi, with the father and his family, with them also studying in a school at Delhi. The respondent herein, i.e. the wife, having filed a reply to the application, the impugned order came to be passed by the learned trial Court.

In view of the judgments cited before that court on behalf of the wife (petitioner there), it was held that the court at Faridabad would have jurisdiction to entertain the suit, the children both being below 5 years of age.

The judgments relied upon by that court to hold as follows, were:-

- (i) Smt. Sarabjit v. Piara Lal and another 2005 (3) RCR (Civil) 213,
- (ii) Amit Kashyap v. Pooja 2017 (1) Law Herald 181 (P&H),
- (iii) Chiranjeev Singh Saini v. Baljit Kaur Saggo 2017 (4) PLR 380 (P&H).

(All co-ordinate Benches of this Court)

6. Other than the application under Order 7 Rule 11 CPC, another application was also decided vide the same order by the learned trial court, upon an application filed by the respondent herein (wife) seeking interim custody of the children during the pendency of the petition there.

That application was however rejected, with the court holding that there was nothing to show that the children were not being well looked after by the father in the home where they had always lived since their birth and therefore they could not be immediately uprooted from there.

However, opportunity was granted to the mother to meet the children on the 3rd Saturday of every month, at the Mediation and Conciliation Centre in the District Court at Faridabad, for a period of 2 hours.

That part of the order in fact has been challenged by the respondent herein, i.e. the mother of the children, by way of Civil Revision no.26107-CII of 2018 and though both the petitions had been initially ordered to be heard together by this Court, since the question of jurisdiction requires decision prior to the question on interim custody, this petition has been taken up first for such consideration.

7. Before this Court, Mr. Sumeet Goel, learned counsel for the petitioner, other than of course pointing to the statutory provision contained in Section 9 of the Act of 1890, relied upon various judgments in support of his case, as follows:-

- (i) **Ruchi Majoo v. Sanjeev Majoo** (2011) 6 SCC 479,
- (ii) **Pooja Bahadur v. Uday Bahadur** AIR 1999 SC 1741,
- (iii) **Himanshu Mahajan v. Rashu Mahajan and others** AIR 2008 HP 38; and
- (iv) **Parshant Chanana v. Mrs. Seema alias Priya** AIR 2010 Punjab 99.

Mr. Goel submitted that the statutory provision being very clear that it is the place of residence of the children that is to determine jurisdiction of a court to entertain a petition seeking custody of children, with the children admittedly living in Delhi and not in Faridabad, the petition has been wholly erroneously filed at Faridabad.

8. *Per contra*, Mr. Ankur Lal, learned counsel for the respondent-wife (mother), reiterated the reasoning given in the judgments cited by the learned trial court to hold that despite the statutory provision, a petition seeking custody would still lie at Faridabad, in view of the fact that the children being below 5 years of age, their natural custody would in fact lie with the mother, and simply because the mother was forced to leave her matrimonial home because of the treatment meted out to her, she cannot be expected to run to Delhi to seek restitution of her statutory and natural right of keeping her minor children with her, even in terms of Section 6 of the Hindu Minority and Guardianship Act, 1956.

9. In rebuttal, Mr. Goel, learned counsel for the petitioner, submitted that, firstly, the respondent wife was not forced to abandon home and had left wholly of her own accord on 16.02.2017, with in fact the petition seeking custody of the children having been filed only on 09.10.2017.

Hence, he submitted that the petition is only to arm-twist the

husband to come to a settlement with her.

10. Having considered the aforesaid arguments, the statutory provisions necessary to be seen are Section 9 of the Guardians and Wards Act, 1890, and Section 6 of the Hindu Minority and Guardianship Act, 1956, which reads as follows:-

Guardian and Wards Act, 1890

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 disposed of more justly or conveniently by any other District Court having jurisdiction.”

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Hindu Minority and Guardianship Act, 1956

“6. Natural guardians of a Hindu minor.—The natural guardian of a Hindu minor, in respect of the minor’s person as well as in respect of the minor’s property (excluding his or her undivided interest in joint family property), are—

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;

(c) in the case of a married girl—the husband:

Provided that no person shall be entitled to act as the natural guardian of a

minor under the provisions of this section—

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).”

11. Thus, though it is very obvious that in terms of sub-section (1) of Section 9 of the Act of 1890 that any application made seeking guardianship of a minor, it is to be made before the District Court that has jurisdiction over the place where the minors are ordinarily residing, however, in view of the fact that the proviso contained in clause (a) of Section 6 of the Act of 1956, stipulates that the custody of a minor who has not completed the age of 5 years shall be ordinarily with the mother, this Court in *Smt. Sarabjits'* case (supra), held that jurisdiction could lie even at the place of residence of the mother.

After quoting the aforesaid provisions from both Acts, this Court (co-ordinate Bench) held as follows:-

“9. A perusal of the Section 9 of the 1890 Act makes it abundantly clear that the application for guardianship of a person of the minor has to be made to the District Court having jurisdiction of the place where the minor ordinarily resides. According to the provisions of Section 2 and Section 5 of the 1956 Act, the 1890 Act is in addition, and not in derogation thereof. In other words, 1890 Act would continue to apply unless there is something contrary provided by 1956 Act. Section 6(A) in unmistakable terms has provided that the mother as against the father is entitled to the custody of a child upto the age of 5 years which is a mandatory provision. Thereafter, the parties namely mother and father may apply for the custody which would be decided by the Court by keeping in view the paramount consideration of welfare of the child. A statutory recognition has been given to the principle of paramount consideration by Section 13 of the 1956 Act.

10. The question then arises whether the expression 'minor ordinarily resides' used in Section 9 could be construed to mean that the minor would cease to reside with his mother. Once under Section 6(1), it is mandatory that a child below the age of 5 years has to reside ordinarily with the mother then the expression 'where the minor ordinarily resides' has to be interpreted to mean the residence of the mother. In other words the residence of the mother would follow the residence of the son. This proposition is supported by the view taken by the Karnataka High Court in the case of K.C. Sashidhar (supra). I am further of the view that the learned Guardian Judge has lost sight of the fact that a period of 2 years had already expired since the filing of application by the petitioner. It is appropriate to mention that the application was filed on 17.3.2002 and she was non-suited by sustaining the objection of lack of territorial jurisdiction. After such a delay ordinarily the petition should not be returned by sustaining the objection of territorial jurisdiction.

It is trite to observe that the paramount consideration of the child have to be kept in view in deciding these matters. The tender age of the child below 5 years would necessarily require the natural love and affection which the child is likely to get in the lap of his mother, rather than that of grand-mother and grand-father who are respondents in this case. The custody of such a child with the mother would facilitate his proper growth and development. For the aforementioned view, reliance could be placed on Section 13 of the 1956 Act and the judgment of Supreme Court in the cases of [*Rajiv Bhatia v. Govt. of NCT Delhi, 1999\(4\) RCR\(Civil\) 149 \(SC\) : 1999\(8\) SCC 526*](#) and *Sayed Saleemuddin v. Rukhsana, 2001(5) SCC 247.*

There is another aspect of the matter which requires to be noticed. It would be highly inconvenient for her to prosecute proceedings for the custody of her minor son Gautam at Ambala. It is well settled that the convenience of hapless woman like the petitioner is always kept in view. It is the duty and function of the Court as has been observed by the Supreme Court in *Surinder*

Kaur Sandhu v. Harbax Singh Sandhu, 1984(3) SCC 698 to protect the wife against the burden of litigation in a convenient forum. Moreover, the proceedings initiated by the petitioner against the respondent-grandparents under Sections 498-A and 406 are also pending in the Courts at Hoshiarpur which the respondent-grandparents have to attend.

For the reasons stated above, this petition succeeds. The impugned order dated 17.1.2004 is set aside. The Guardian Judge, Hoshiarpur is directed to decide the petition filed by the petitioner-mother expeditiously. Keeping in view the principles enunciated by Section 6(1) of 1956 Act, the interim custody of the minor child Gautam who is admittedly below five years of age is granted to mother. Let the child be handed over to the petitioner-wife within a period of one week from today. The petitioner-mother shall also be entitled to costs which are quantified as Rs. 10,000/-.

Petition allowed.”

(All emphasis applied in this judgment only)

It is necessary to state here that the decision aforesaid was given after considering the judgment of the Supreme Court in *Pooja Bahadurs'* case (supra), with the judgment of the Karnataka High Court, as is referred to by his Lordship, being **K. C. Sashidhar v. Smt. Roopa** AIR 1993 Karnataka 120.

12. In *Pooja Bahadurs'* case, also cited before this court by Mr. Goel, learned counsel for the petitioner herein, the Supreme Court had approved the order of this Court holding that as the child was residing at Delhi with the father, it would be the Guardians and Wards Court at Delhi that had jurisdiction, and not a Court at Chandigarh. [The age of the children in that case have not been mentioned in the order of the Supreme Court, and eventually their Lordships went on to direct that the proceedings before the

court at Chandigarh be transferred before the competent court at Delhi, further giving directions with regard to the interim right of the mother to meet the children on alternative Saturdays (as already been ordered by the court at Chandigarh), till such time that the 'Guardian Court' at Delhi did not decide the question of further interim or final relief].

13. In *Ruchi Majoos'* case (supra), though the minor child had been residing with both parents in the USA earlier, however, the mother was stated (as per the father) to have got him to Delhi on the ground that she wanted to try her career option in dental medicine at Delhi.

Then, in Delhi, the mother had instituted a petition seeking custody of the child, with the Delhi High Court eventually having held that jurisdiction did not lie at Delhi, the child being ordinarily resident of the USA.

The Supreme Court went on to state that whether the child had been allowed to be kept in Delhi as an voluntary decision or was taken by the mother under duress, was a seriously disputed question of fact which could not actually be answered by either the District Court or the High Court even after evidence had been led; however, eventually, after discussing the entire set of the facts of that case, their Lordships went on to hold that it could not be found that the child had been kept in India or under coercion or duress; and therefore jurisdiction was held to lie with a Delhi court, where the mother (applicant/petitioner) was seeking his custody.

14. In *Himanshu Mahajans'* case (supra), the Himachal Pradesh High Court took a wholly contrary view to that taken by this Court in *Smt. Sarabjits'* case (supra), by holding that even though the minor son of the parties in that case had not completed 5 years of age and therefore his natural

custody in terms of Section 6 of the Act of 1956 was to be with his mother, factually he not being resident at Sundernagar (HP), where the mother was residing in her parental home, but was a resident of Delhi ever since his birth, where his father was residing, it would not be the Court at Sundernagar but a Court in Delhi that would have jurisdiction to entertain a petition in terms of Section 9 of the Act of 1890.

15. However, in this court, the ratio in *Sarabhjits'* case has been followed by another co-ordinate Bench of this Court in *Amit Kashyaps'* case (supra), of course, by holding that no law contrary to that laid down in *Sarabhjits'* case was brought to the notice of the Bench.

A similar view was again taken in *Chiranjeev Singh Sainis'* case (supra).

16. It is also necessary to notice here that the judgment cited by Mr. Goel of another co-ordinate Bench of this Court in *Parshant Chananans'* case (supra), would have no application to the present case, because though the child in that case was otherwise shown to be residing at Lucknow with the sister of her father, with both the estranged parents residing at Chandigarh, where the mother had instituted the petition seeking the child's custody, (at Chandigarh), this court, even while observing that Section 9 makes it clear that it is the ordinary place of residence of the minor which determines jurisdiction of a court, the words "ordinarily resident" could not be taken to be meaning that the child was ordinarily residing at Lucknow, where she had been sent by her father to his sister, though he himself was also resident in Chandigarh, as was the mother of the child.

17. A judgment of a Division Bench of this Court also needs to be referred to, in the case of **Sunaina Chowdhary v. Vikas Chowdhary**

2013(5) RCR (Civil) 96.

In that case, though the petitioner and her two children, as also her husband, i.e. the father, had shifted to New Zealand (with the petitioner-mother allegedly having been forced to shift there alongwith the children), and a court at New Zealand was also seized of the matter of custody of the children, however, on a petition filed by the father, it was still held by the Division Bench that the children, being citizens of India, holding Indian passports and having been born at Gurgaon, they would be deemed to be ordinarily resident of India, having shifted to New Zealand only as a temporary arrangement, and a petition for custody filed in an Indian court could not be ousted on the ground of lack of jurisdiction.

18. Thus, in the light of the aforesaid decisions, as also the statutory provision, though otherwise in the face of Section 9 of the Act of 1890, there would be no doubt that an application seeking custody of a minor child necessarily has to be filed at the place where the child ordinarily resides, and on the touchstone of that provision, with it not at all disputed in the present case that the children admittedly have lived with their father in his home at Delhi ever since their birth, the application/petition filed by the respondent mother should have been before a court at Delhi; however, it having been held in *Sarabjits'* case that since under Section 6 of the Act of 1956, the custody of a child below the age of 5 years is ordinarily to be with the mother and consequently, if the mother does not have that custody, she still would be entitled to institute an application/petition even under the Act of 1890 at the place where she normally resides, as the children should ordinarily have been resident with her in the first place, I would, on principle, agree with that view.

It is however necessary to notice here that the child in that case

was residing with the paternal grandparents at Ambala, after the husband of the petitioner in that case had died in mysterious circumstances, with the mother (wife of the deceased) residing at her parental home in Hoshiarpur, upon allegedly having been turned out of her matrimonial home after his death.

19. It is also necessary to notice, in the present case, that this petition was being heard alongwith the one filed by the wife, challenging that part of the impugned order by which she has been granted visiting rights only in the court premises on the 3rd Saturday of each month. This Court had, in that petition, called upon her to disclose her financial ability to look after the children in her parental home. (Learned counsel for the father had also submitted to this Court that though the father is a working man, yet the children have faced no problem living with their grandparents after they return from school during the day).

In response to the aforesaid direction of this Court, the respondent herein, i.e. the mother of the children, as also her parents, had filed affidavits annexing therewith rent deeds in respect of the properties owned by them, to show that, firstly, they had sufficient financial means to look after the children, and further, that there was a school near their home to which the children would be admitted.

20. Though Mr. Goel, learned counsel for the father, had stated that the mother has made a complete *volte face* in respect of her stand taken in another proceeding whereby she sought maintenance, however, that being a separate matter, what this Court has to determine presently is as to whether jurisdiction qua the petition filed by the mother lies at Faridabad. The financial capacity of the mother has been referred to because it needs to be

considered by this Court as to why, if she has no financial difficulty, the mother could not have filed the petition at Delhi, the distance between Delhi and Faridabad (especially when the father and children are stated to be residing at Mayur Vihar).

21. Yet, even having considered the above, and even while observing that once the mother was not in any financial problem (as has been projected in the accompanying petition before this Court), she could have instituted the petition at Delhi in terms of Section 9 of the Act of 1890, I would still not hold at this stage that proceedings be now instituted at Delhi.

All judgments on child custody, first and foremost hold (naturally) that it is the welfare of the child that has to be first looked into; hence, this Court now cannot ignore that the custody battle was instituted more than 1 year ago by the respondent mother in the court at Faridabad, and that court, vide the impugned order, not having ousted its own jurisdiction while deciding the application under Order 7 Rule 11 CPC, in view of judgments cited before it of this Court, it would be prolonging the agony to oust jurisdiction of that court. Further, on principle, in any case, I would agree and respectfully follow the ratio of the judgment in *Smt. Sarabjits'* case (supra), to the effect that the mother being the natural guardian of a child less than 5 years of age, as per the proviso contained in clause (a) of Section 6 of the Act of 1956, and therefore correctly the custody of such children should have been with her, jurisdiction of the court situate in her district/area of residence, cannot be ousted.

This would be especially so in the case of a woman who may not have the means to approach a court at the place where the husband resides alongwith such minor children (below 5 years of age), as, normally, the

husbands' earning capacity even today is usually higher, (though not necessarily so in sections of urban society).

In the present case of course, it may actually be that the wives' income from all sources (including her parents' income in terms of their affidavits committing to support her financially), is more than the husbands'; yet, with jurisdiction having been held by this Court in 3 cases to be also lying with the court in whose jurisdictional area a mother resides, with the present proceedings before the 'Guardian Judge' now having remained pending for 1½ years, I would be loathe to hold that simply because the mother is not in a bad financial condition (as per her own stand in the accompanying petition), she should institute proceedings afresh now in a court at Delhi, thereby putting the fate of the custody of the children further *in limbo*, or subjecting their custody to further uncertainty for a longer period.

22. Consequently, keeping in view the entire situation and circumstances, I would not interfere with the impugned order and would also hold (as per the ratio of *Sarabjits'* case), that when Section 9 of the Guardians and Wards Act and the proviso contained in Section 6 (a) of the Hindu Minority and Guardianship Act, 1956, are read together, the jurisdiction of a court at the place where the mother of children less than five years old resides, cannot be ousted in a petition seeking their custody.

23. Further, in my opinion, this would also be so even in terms of the ratio of the judgment of the Division Bench in *Sunaina Chowdharys'* case (supra), wherein though the children were ordinarily resident of New Zealand, this Court even so held that the jurisdiction to entertain a petition seeking custody of a minor child, would lie in a court in India also.

In fact, in *Ruchi Majoos'* case (supra) also, though the

circumstances were also different to the present one, where the mother had come to India from the USA with the children, and had instituted the petition under the Act of 1890 in Delhi, (though the children were otherwise resident of the USA), the Supreme Court had held that the Court at Delhi did have jurisdiction to entertain and adjudicate upon that petition.

24. Hence, both, in view of the principle contained in *Sarabjits'* case, as also because of the fact that more than one year has gone by since the petition was instituted at Faridabad, I would not interfere with the impugned order as regards the jurisdiction of the court at Faridabad.

25. Consequently, this petition is dismissed, with the court at Faridabad held to have jurisdiction to continue with the petition before it, specifically also keeping in mind that instituting a fresh petition at Delhi now, would not be in the interest of the children, in my opinion.

December 18, 2018

dinesh/dinesh

**(AMOL RATTAN SINGH)
JUDGE**

1. Whether speaking/reasoned?	Yes/No
2. Whether reportable?	Yes/No