

FAO-7250-2017 (O&M)

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**FAO-7250-2017 (O&M).
Decided on: August 2, 2018.**

Devender Sharma

.. Appellant

VERSUS

Renu Sharma and another

.. Respondents

*** * ***

**CORAM: HON'BLE MR.JUSTICE M.M.S.BEDI
HON'BLE MR.JUSTICE ANUPINDER SINGH GREWAL**

*** * ***

**PRESENT Mr.Raje Ram Kaushik, Advocate,
for the appellant.**

**Mr.Rahul Garg, Advocate,
for respondent No.1.**

M.M.S. BEDI, J. (ORAL)

The present appeal has been preferred under Section 19 of the Family Courts Act, 1984, challenging order dated 10.10.2017 passed by the Family Court, returning the petition under Section 25 read with Section 7 of the Guardians and Wards Act, 1890, for the grant of custody of the minor child Anish @ Deepanshu @ Rishi from the custody of the parents of respondent No.1, the ex-wife of the appellant.

Brief facts, which are relevant for the decision of the appeal are that the appellant had initially filed a petition for the custody of

FAO-7250-2017 (O&M)

the minor child born out of his wedlock with Renu Sharma respondent No.1 at Ambala against the parents of Renu Sharma. Later on, he filed an application under Order 1 Rule 10 CPC read with Section 151 CPC, for impleading respondent No.1 in the petition as 3rd respondent being a necessary party.

During the course of proceedings at Ambala, Renu Sharma, respondent No.1, shifted the child to Patiala after the death of her father on 7.12.2016. She raised objections before the Court regarding the jurisdiction claiming that from the very beginning child would be deemed to be the ordinary resident of Patiala where she has been residing though for the time being for the sake of study, the child came to Ambala and resided with respondent, Smt. Kamla maternal grandmother of the child, like a child resides in hostel at different places for education purposes but ordinarily the child will be deemed to be residing in the custody of the parents.

While the Court was deciding the application for impleadment of Renu Sharma as a party on the basis of the pleadings in adjudication of the application under Order 1 Rule 10 (2) CPC, the learned District Judge, Family Court, Ambala, returned the petition for presenting the same at Patiala.

The said order has been challenged on the grounds that on account of respondent No.1 having remarried and given birth to three children, it will be in the interest and welfare of the child that the custody of the child should be handed over to him. The other ground which has been taken up in the appeal is that return of petition is illegal at the stage when

the proceedings in petition under Section 25 of the Guardians and Wards Act, was at penultimate stage. It has also been challenged on the ground that the definition of '*permanent residence*' under Section 9 (1) of the Guardians and Wards Act, 1890, would ordinarily be the place of residence of the minor which would determine the jurisdiction and such jurisdiction of the Court cannot be taken away by taking away the temporary residence of the child from one place to another. It was also argued that the appellant is resident of Kurukshetra. He had earlier filed a petition at Kurukshetra for the custody of minor child which was withdrawn with liberty to file the same at Ambala because the child was living at Ambala. Merely because during pendency of the petition, respondent No.1 had taken away the child to Patiala, the Court at Ambala will not lose jurisdiction and the petition could not have been ordered to be returned under Order 7 Rule 10 (1) CPC.

We have heard the counsel for both the parties at length and taken into consideration the written submissions made by respondent No.1 that the minor child Anish @ Deepanshu @ Rishi, does not even identify the appellant as his father and does not want to meet him and he is living a peaceful life. Respondent No.1 while appearing before the lower Court as RW.1 had stated that she stayed with the appellant only for six months and thereafter went to her parental house and the husband did not agree to provide any treatment during pregnancy. She had shifted to Patiala, but the child continued to study at Ambala at S.A. Jain Model School but later on was finally shifted to a school at Patiala. The appellant was guilty of his own wrong, as such was not entitled to any benefit.

FAO-7250-2017 (O&M)

We have considered the facts and circumstances of the case. Records had been called.

A perusal of the record of the lower Court indicates that the appellant had filed a petition under Section 25 of the Guardians and Wards Act, 1890, in the Court of Guardian Judge, Kurukshetra on 16.2.2009 but on an application under Order 7 Rule 11 CPC, having been filed by the parents of respondent No.1, the appellant chose not to appear as a result of which the same was dismissed under Order 9 Rule 8 CPC. Thereafter, the appellant filed a petition under Section 25 of the Guardians and Wards Act, 1890, on 27.11.2014 at Ambala.

A perusal of the lower Court record further indicates that after the evidence of the appellant was closed, the case was adjourned to 11.9.2017 for evidence of the respondent. Statement of Renu Sharma as RW.1 was recorded on 14.9.2017 and her cross-examination was completed on 27.9.2017 and thereafter, the case was adjourned to 3.10.2017 for the entire evidence of the respondents at own responsibility. The evidence of the respondents was closed on 3.10.2017 and the case was adjourned for rebuttal evidence and arguments for 9.10.2017. On 9.10.2017, an application under Order 1 Rule 10 (2) read with Section 151 CPC, was filed for adding the name of Renu Sharma. Reply to the said application was filed and the application was taken up for consideration on 10.10.2017 on which date, the impugned order has been passed returning the petition under Section 25 of the Guardians and Wards Act, 1890, to be presented at Patiala.

FAO-7250-2017 (O&M)

The issues framed in the proceedings on 30.4.2015 are as under:

1. Whether the petitioner is entitled to custody of minor Anish @ Deepanshu @ Rishi Rishi on the grounds pleaded in the petition?OPP
2. Whether the petition is not maintainable? OPR
3. Relief.

We have considered the arguments of counsel for both the parties. When the impugned order dated 10.10.2017 was passed, at that time, the evidence of both the parties had been closed in affirmative and the trial Court after impleading respondent No.3 as a party could have taken up the case for final adjudication. The plea of jurisdiction on the basis of the evidence produced could have easily been raised and decided. It is pertinent to mention here that we are not expressing any opinion regarding the merits of the case or entitlement of the parties or their respective claims but the appeal is being decided only on legal issue.

We are of the considered opinion that the petition of the appellant has been returned for want of jurisdiction at a stage when the Court was required to decide the case by giving a finding on appreciation of evidence as per the provisions of Order 20 Rule 5 CPC which read as follows:—

“5. Court to state its decision on each issue:-

In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding

upon any one or more of the issues is sufficient for the decision of the suit.”

It is apparent from the facts and circumstances of this case that the question of jurisdiction in the present case has been a mixed question of fact and law. Issue regarding jurisdiction could not have been treated as a preliminary issue. The preliminary point has to be pleaded by a party for adjudication of the same. In the present case, the plea of jurisdiction has been raised in reply to the application under Order 1 Rule 10 (2) CPC. The Court has adopted an evasive approach to finally dispose of the petition under Section 25 of the Guardians and Wards Act, to decide the same on merits. The impugned order for the return of petition is thus, not sustainable in the eyes of law taking into consideration the stage at which the proceedings had reached when the petition was returned.

In view of above, the appeal is allowed and order dated 10.10.2017, is hereby set aside. The parties are directed to appear before the District Judge, Family Court, Ambala, on 1.9.2018, for adjudication of the proceedings and for decision of the petition on merits. The Court will take up the adjudication of the proceedings on merits from the stage when the impugned order to return the petition was passed on 10.10.2017. As both the parties are represented before this Court through their respective counsel, it will be deemed that they have got knowledge about the date of appearance before the Family Court, Ambala, for further adjudication of the matter.

Nothing said in this order will affect the rights of the

FAO-7250-2017 (O&M)

parties. It will be open to the Family Court, Ambala, to pass any order on appreciation of evidence on merits of the case as well as pertaining to the jurisdiction.

(M.M.S. BEDI)
JUDGE

August 2, 2018.
raj arora

(ANUPINDER SINGH GREWAL)
JUDGE

Whether speaking / reasoned	Yes / No
Whether reportable	Yes / No