

HIGH COURT OF CHHATTISGARH, BILASPUR

FAM No. 42 of 2018

Smt. Jyoti Chouhan W/o Shri Vinay Kumar Chouhan Aged About 25 Years
R/o Through Rajesh Devdas, Nayapara Ward No.1, Durg, Police Station City
Kotwali, Durg, Chhattisgarh, District : Durg, Chhattisgarh

---- Appellant

Versus

1. Vinay Kumar Chouhan S/o Shri D.R.Chouhan R/o Rajkishore Nagar, Bilaspur, Chhattisgarh, Presently Residing At Mphasis Limited, Cybercity, Tower Iv, Magariputta City Hadasopory, Pune (M.H.) Residency Viman Nagar, In Front Of Innovit Mall, District : Pune, Maharashtra
2. Kumari Paridhi Chouhan D/o Shri Vinay Kumar Chouhan Aged About 5 Years Minor Through Natural Guardian Vinay Kumar Chouhan, R/o Rajkishore Nagar, Bilaspur, Chhattisgarh, Presently Residing At Mphasis Limited, Cybercity, Tower Iv, Magariputta City Hadasopory, Pune (M.H.) Residency Viman Nagar, In Front Of Innovit Mall, District : Pune, Maharashtra

---- Respondents

For Appellant : Shri Pankaj Agrawal, Advocate

For Respondents : Shri Sushil Dubey, Advocate

**D.B. :Hon'ble Mr. Justice Manindra Mohan Shrivastava &
Hon'ble Mrs. Justice Vimla Singh Kapoor**

Judgment On Board

09/07/2019

Per Manindra Mohan Shrivastava, J.

1. This appeal is directed against the order dated 4.1.2018 passed by the Family Court, Durg whereby application under Section 8 read with Section 25 of the Guardians & Wards Act, 1890 (hereinafter referred to as "*the Act*") filed by the wife for custody of her minor daughter, has been rejected on the ground of lack of territorial jurisdiction.

2. Briefly stated, the factual backdrop giving rise to this appeal are that the mother of the child, the appellant, moved an application under Section 8 read with Section 25 of the Act before the Family Court, Durg, stating that she is the natural guardian of 5 years old girl child who is residing with her and was taking education at Durg. The allegation in the application was that respondent- husband had come to meet the child and had taken her by stating that he will come back in couple of days. But when the husband did not come back, the appellant inquired and she came to know that without informing her, her husband/respondent has removed the child to a third place and is not bringing the daughter back. On this factual allegation, prayer was made for granting custody of the child to the mother.
3. When the matter came up for consideration before the Family Court, the Family Court, at the threshold, even without registration of the case, held that as, according to the plaint allegation, the father has taken the child to another place which falls outside the territorial jurisdiction of the Family Court, Durg, the application was rejected with liberty to approach the Court having territorial jurisdiction. It is this order against which this appeal has been preferred.
4. Learned counsel for the appellant would argue that the learned Family Court committed grave error of law in rejecting application on the ground of lack of territorial jurisdiction, without determining the issue which essentially is of the fact, by allowing the parties to lead oral and documentary evidence. He would argue that the provision of Section 9 of the Act confers territorial jurisdiction to the Court where the minor ordinarily resides. He would argue that the words "ordinarily resides", are required to be interpreted to mean where the child has been residing ordinarily, taking up education etc. and not where the child has been kept causally and temporarily for few days, after having been removed from place where the child was actually ordinarily residing. He would also argue that at this stage, the learned Family Court was also not legally correct in rejecting the application because none of the situation as contained in Order IV, V, VI & VII CPC or Rules 37 to 41 of the Civil Courts Rules or provision contained in Order 7 Rule 11 (a to f) CPC are attracted. In such a case, the only course open for the Family Court was to register the

application as suit and proceed with the same in accordance with law. Learned counsel for the appellant relied upon the decision of this Court in the case of **Bhojram Rawat Vs. State of C.G.** 2017 (3) CGLJ 15 (DB).

5. Per contra, learned counsel for the respondents would argue that even according to plaint allegation made by the appellant, at the time of moving application for custody of the child, the child was residing at Pune. Thus, on appellant's own saying, the child is not residing at Durg. Therefore, the Court at Durg will not have territorial jurisdiction. He would also submit that the allegation contained in the plaint that the child ordinarily resides at Durg and has been removed from the custody of mother and her present residence is only casual or temporary is not correct. Learned counsel for the respondents, in support of his submission, placed reliance on the decision in **Vinod Goyal Vs. Sarita Goyal (2006)** AIR (Uttaranchal) 36 .
6. We have heard learned counsel for the parties and perused the records of the Court below.
7. The contents of the application under Section 8 read with Section 25 of the Act filed by the appellant-mother, in brief, are that she was married to respondent in the year 2010 and they were blessed with a girl child, now aged 5 years. The other allegation made in the application are that she resided with her husband for about one year, but, thereafter, she was subjected to cruelty, harassment and unceremoniously shunted out of the matrimonial house. As the appellant got an employment, she started residing with the girl child 'Paridhi' at Durg and she has also been admitted in a play school and the child is presently residing with the appellant.

According to the plaint allegation, respondent-husband had come to Durg in the month of August 2017 and took the girl child away for 2-3 days to Bilaspur, saying that the child would be meeting her grand parents, to which the appellant did not object. However, even after lapse of a week, the respondent did not return with the child and upon enquiry, the appellant came to know that without informing the appellant and in a clandestine manner, the respondent-husband has taken the child away to Pune.

8. On the aforesaid pleadings, the appellant claimed that she is entitled to custody of the child being the girl child aged 5 years of which, the mother is

the natural guardian.

9. When the application came up for consideration of the Family Court for registration on 4.1.2018, the learned Family Court formed an opinion that as according to the plaint allegation, the child is presently residing at Pune, the Family Court at Durg will have no jurisdiction in terms of provision contained in Section 9 (1) of the Act. Therefore, only on this ground, the learned Family Court did not register the case.

10. Section 9 of the Act makes provision with regard to jurisdiction of the Court to entertain applications under the provision of the said Act. The relevant provision is extracted 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.”

11. Sub-Section (1) of Section 9 of the Act clearly provides that 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. The provision manifests that the Court within whose jurisdiction the minor ordinarily resides will have territorial jurisdiction to entertain application for guardianship of the minor.

Words “ordinarily resides” was considered by Their Lordships in the Supreme Court in the case of **Ruchi Majoo Vs. Sanjeev Majoo** (2011) 6 SCC 479 wherein it was held that the solitary test for determining the jurisdiction of the Court under Section 9 of the Act is the ordinary residence of the minor. Ordinary residence means where the minor ordinarily resides. The use of word “resides” implies something more than a flying visit to, or casual stay at a particular place. The test for determining jurisdiction is the place of ordinary residence of minor and intention to make that place one's ordinary abode. In this regard, it is pertinent to extract observations made by the Supreme Court in the said decision, which are as below:

“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.

x	x	x
x	x	x

26. We may before doing so examine the true purpose of the expression ‘ordinarily resident’ appearing in Section 9(1). This expression has been used in different contexts and statutes and has often come up for interpretation. Since liberal interpretation is the first and the foremost rule of interpretation it would be useful to understand the literal meaning of the two words that comprise the expression. The word ‘ordinary’ has been defined by the *Black's Law Dictionary* as follows:

"*Ordinary* (Adj.)- :Regular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances; belonging to, exercised by, or characteristic of, the normal or average individual."

The word `reside' has been explained similarly as under:

"*Reside*:- live, dwell, abide, sojourn, stay, remain, lodge. (*Western- Knapp Engineering Co. V. Gillbank*, F 2d 135, 136.) To settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically, to be in residence, to have an abiding place, to be present as an element, to inhere as a quality, to be vested as a right. (*Bowden v. Jensen* S.W.2d at p.349.)"

27. In *Webster's dictionary* also the word `reside' finds a similar meaning, which may be gainfully extracted:

"1. To dwell for a considerable time; to make one's home; live. 2. To exist as an attribute or quality with in. 3. To be vested: with in."

28. In *Annie Besant v. Narayaniah* the infants had been residing in the district of Chingleput in the Madras Presidency. They were given in custody of Mrs. Annie Besant for the purpose of education and were getting their education in England at the University of Oxford. A case was, however, filed in the district Court of Chingleput for the custody where according to the plaintiff the minors had permanently resided. Repeating the plea that the Chingleput Court was competent to entertain the application their Lordships of the Privy Council

observed: (IA p.322)

".....The district court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act 1890. By the ninth Section of that Act the jurisdiction of the court is confined to infants ordinarily resident in the district. It is in their Lordship's opinion impossible to hold that infants who had months previously left India with a view to being educated in England and going to the University of Oxford were ordinarily resident in the district of Chingleput."

29. In *Jagir Kaur and Anr. v. Jaswant Singh*, this Court was dealing with a case under Section 488 Cr.P.C. and the question of jurisdiction of the Court to entertain a petition for maintenance. The Court noticed a near unanimity of opinion as to what is meant by the use of the word "resides" appearing in the provision and held that "resides" implied something more than a flying visit to, or casual stay at a particular place. The legal position was summed up in the following words:

8".....Having regard to the object sought to be achieved, the meaning implicit in the words used, and the construction placed by decided cases thereon, we would define the word "resides" thus: a person resides in a place if he through choice makes it his abode "permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case....."

30. In *Kuldip Nayar & Ors. v. Union of India & Ors.*, the expression "ordinary residence" as used in the Representation of People Act, 1950 fell for interpretation. This Court observed:

"243. Lexicon refers to *Cicutti v. Suffolk County Council* to denote that the word "ordinarily" is primarily directed not to duration but to purpose. In this sense the question is not so much where the person is to be found "ordinarily", in the sense of usually or habitually and with some degree of continuity, but whether the quality of residence is "ordinary" and general, rather than merely for some special or limited purpose.

244. The words "ordinarily" and "resident" have been used together in other statutory provisions as well and as per *Law Lexicon* they have been construed as not to require that the person should be one who is always resident or carries on business in the particular place.

245. The expression coined by joining the two words has to be interpreted with reference to the point of time requisite for the purposes of the provision, in the case of Section 20 of the RP Act, 1950 it being the date on which a person seeks to be registered as an elector in a particular constituency.

246. Thus, residence is a concept that may also be transitory. Even when qualified by the word "ordinarily" the word "resident" would not result in a construction having the effect of a requirement of the person using a particular place for dwelling always or on permanent uninterrupted basis. Thus understood, even the requirement of a person being "ordinarily resident" at a particular place is incapable of ensuring nexus between him and the place in question."

31. Reference may be made to *Bhagyalakshmi v. K.N. Narayana Rao*, *Aparna Banerjee v. Tapan Banerjee*, *Ram Sarup v. Chimman Lal*, *Vimla Devi v. Smt. Maya Devi and Giovanni Marco Muzzu (Dr.)*, In

re , in which the High Courts have dealt with the meaning and purport of the expressions like 'ordinary resident' and 'ordinarily resides' and taken the view that the question whether one is ordinarily residing at a given place depends so much on the intention to make that place ones ordinary abode."

12. In one of the decision of Orissa High Court in the case of **Koduparthi Venkateshwarlu & Ors. Vs. Ramavarapu Viroja Nandan & Ors.** (AIR 1989 Orissa 151), it was held that the temporary residence at a particular place or residence by compulsion at a place however long, cannot be treated as the place of ordinary residence and the words "ordinarily resides" are not identical and cannot be assigned the same meaning as "residence at the time of the application".

The purpose for using the expression "where the minor ordinarily resides" is to avoid mischief that a minor may be stealthily removed from one place to other. If the words "ordinarily resides" is given a narrow meaning to mean actual residence on the date of filing of application, irrespective of whether that happens to be the place where the child is ordinarily residing or a place where the child has been voluntarily removed and temporarily kept for some time, it would defeat the very object of legislation. Therefore, irrespective of whether the child actually resides at some other place, if the allegation are that the child has been stealthily removed from the custody and taken to another place and the party making allegation is able to establish that the place where the application is made would be having territorial jurisdiction by virtue of that being the place where the child ordinarily resides, the Court will definitely have territorial jurisdiction.

13. When the application is filed before the Court and allegations are made, the Court is required to decide the issue as to whether the child ordinarily resides within the territorial jurisdiction of the Court, only after allowing parties to lead necessary evidence in that regard, if necessary, by framing preliminary issue rather than throwing the application without registration.

14. Therefore, in view of the judicial pronouncement of the Supreme Court and

various High Courts, we are of the considered view that the learned Family Court was required to consider the matter of territorial jurisdiction only after allowing other party to file reply and then framing preliminary issue followed by opportunity to respective parties to lead evidence before coming to the conclusion whether the minor child ordinarily resides within the territorial jurisdiction.

15. In view of the above consideration, impugned order cannot be sustained and is therefore set aside. The Family Court, Durg is directed to register the application and decide the same in accordance with law and the observations made by this Court in so far as issue with regard to territorial jurisdiction is concerned. Records of the Court below be sent back forthwith.

16. The appellant shall appear before the Family Court, Durg on **8th August 2019**.

17. The appeal is accordingly allowed to the extent indicate above.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Vimla Singh Kapoor)
Judge