

A.No.7197 of 2019
in
O.P.No.474 of 2018

P.T.ASHA, J.,

This application for rejecting the petition has been filed by the respondent in the petition filed for permanent custody of two of the minor children of the petitioner and the respondent. This petition has been filed on the ground that this Court is not vested with the Jurisdiction to try the petition as the ordinary residence of the minors is at France, where already proceedings are pending between the petitioner and the respondent for divorce as well as custody of the children. Before proceeding to discuss the application, it is necessary to briefly narrate the facts as stated in the petition.

Case of the respondent / petitioner:

2. It is the case of the respondent / petitioner that he and the

applicant herein had got married at France on 02.09.1995 and out of this wedlock they were blessed with three children. The petition is filed with reference to the second and third child as the eldest has attained majority. The respondent would contend that both he and the applicant were orphans born in India in the year 1966 and 1969 respectively and the respondent was adopted by a Belgian couple, whereas the applicant was adopted by a French couple. The applicant and the respondent met at Belgium and ultimately got married at France.

3. In December 1995, they had travelled to Puducherry tracing their roots and on arrival they decided to settle in India. All the three children were born at Belgium. The eldest daughter was born on 07.10.1999, the second son was born on 24.07.2001 and the last daughter was born on 07.07.2004. The petitioner was gainfully employed there and he had purchased an house at Belgium in the year

2003.

4. The applicant had lost her father in the year 2004 and it is the case of the respondent that thereafter his mother-in-law started getting very possessive and overbearing. In the year 2008, Auroville had celebrated its 40th anniversary. The applicant and the respondent had joined the celebrations at Paris and the applicant expressed her strong desire to settle down in Auroville. The desire was so strong that the respondent had started making arrangements to permanently reside in India. As a consequence of this the applicant and the respondent had come out to Auroville between July - August 2010 and in January 2011 they had enrolled their children at Deepanam School at Auroville.

5. In February 2011, they had taken steps to obtain the Overseas Citizens of India certificate for all the children. Originally the OCI stamping was done for the children in their Belgium Passports and

thereafter this was cancelled and the OCI stamping was affixed in the French Passports as approaching the French Embassy at Puducherry was easier. The respondent had got life long Visa in his Belgium passports and the applicant got a life long visa on her French passport. The children were also given a lifelong visa. The respondent sold his house at Belgium in July 2012 and the family moved to India in the same month. The intention to permanently settle down in India was fortified by the fact that they had only taken a one way ticket.

6. In August 2012, the children had started school and all the three of them enjoyed their School at Auroville. The applicant had also confirmed their continuance for the next academic year i.e., 2013 - 2014. In March 2013, the applicant had suggested that the family spend their holiday in Europe both at Belgium and France. The applicant herein had booked a two way ticket and the family was supposed to return on 11.06.2013 to India. However, all of a sudden

things went haywire and the applicant for reasons best known to her, refused to move to India and accused the respondent of kidnapping children though the children had been spending the holiday with him at Belgium. The applicant had also lodged a letter with the French office for protecting the minors and to take immediate steps to ensure that the children are not moved to India. The respondent on hindsight thinks that the applicant had decided even while leaving India that she would not return back.

7. Thereafter, on 09.06.2013, the applicant had come to Belgium and taken back the children. She had also informed the respondent that he could visit the children at France. Therefore the respondent could not return to India on 11.06.2013 as planned. The applicant had also initiated steps for divorce before the French Family Court. According to the respondent, the applicant had filed the application making false allegations. Thereafter, the respondent had issued a notice dated

21.11.2013 calling upon the applicant to return back to Auroville. On 22.07.2013, there had been an order passed by the French Court that no-conciliation was possible amongst the parties and therefore directed them to sue for divorce. The custody of the children were to remain with the applicant and the respondent was permitted to have a joint parental authority. This order was appealed by the respondent and by order dated 06.05.2014 the appeal was rejected. He thereafter moved the highest Court of appeal, namely, Court of Cassation, who by their order dated 15.11.2017 had remanded the matter back to the Paris Court directing the learned Judges to look into the issue of suppression of facts, lack of Jurisdiction etc pleaded by the respondent herein.

8. The respondent had also moved Habeas Corpus petition which was rejected since the children were with their mother. Therefore, in the light of the order passed by the Court of Cassation the respondent has moved this Court. He would contend that this Court has

Jurisdiction since the applicant and the respondent along with the children had shifted from Belgium to settle down permanently in India and in furtherance of which the children had also been enrolled in Indian School. The trip to Europe in the month of May 2013 was only as an holiday and not to set up permanent residence there.

Application for rejecting the petition:

9. The applicant on receiving summons in the above matter has come forward with the present application. The above application has been filed on two grounds:

a) Neither this Court has territorial jurisdiction to entertain the petition nor has the cause of action arisen within the Jurisdiction of this Court.

b) The petition is nothing but an abuse of process of Court since the petitioner had already submitted himself to the Jurisdiction of the Courts at France and therefore the present petition is totally misconceived and is a vexatious litigation.

10. The respondent has countered the said application inter alia contending that the applicant and the respondent had come to India in the year 2012 with an intent to make this their permanent residence and with that intent they had also enrolled their children in the School at Auroville. The house at Belgium was also sold in the year 2012 only on account of the fact that the parties had decided to make India their permanent home. The trip to Europe in May/June 2013 was only a vacation and not for returning back to France. The respondent would submit that therefore the permanent residence of the children as contemplated under Section 9 of the Guardians and Wards Act, herein after called as the Act, would only be India and not France.

11. The respondent would further submit that even otherwise the children were permanently residing at Belgium prior to coming to India and therefore it cannot be stated that the children are ordinarily residing

at France since they had started residing in France only in July 2013. The respondent would further submit that the Court of Cassation by their order dated 15.11.2017 has clearly held that the French Courts do not have jurisdiction in the matter as the parties were not ordinarily residing in France. Therefore, the petition filed before this Court was very much in order and this Court has the necessary Jurisdiction to decide on the issue. He would therefore submit that the application should be dismissed. The rejoinder has also been filed by the respondent.

Submissions:

12. The extensive arguments were made by both the learned counsels. The applicant would rely upon the Judgement of the Punjab and Haryana High Court in *Civil Revision No.2322 of 2018 - Kamal Virmani Vs. Geeta Virmani*.

13. That was the case where the wife had left the matrimonial home at Faridabad and relocated to her maternal residence at Ludhiana and she had filed a petition for custody of the minor at the Ludhiana Court. The respondent husband had taken a plea that the Court at Ludhiana lacked jurisdiction since child was originally residing at Faridabad. Therefore the Court at Ludhiana was not the Court as contemplated under Section 9 of the Act. The application filed by the husband for rejecting the petition under Order VII Rule 11 of the Code of Civil Procedure was dismissed.

14. Challenging the said order revision was filed before the High Court of Punjab and Haryana. The learned Judge after considering the circumstances under which the mother was forced to leave the matrimonial home observed that child being a minor aged 4 months, the presumption is that the child is residing with the mother and in

these circumstances no ground was made out to interfere with the impugned order.

15. The learned counsel for the applicant would draw the attention of the Court to the School documents which would show that all the three children have been enrolled into the School in September 2013 itself and are undergoing their Schooling there. The learned counsel further submitted that the applicant and her children are now permanently residing at France and therefore the petition filed for Custody by the respondent before this Court has to be rejected as this Court is not the Court as contemplated under Section 9 of the Act.

16. Ms.B.Poonguzhali, learned counsel appearing on behalf of the respondent after taking the Court to the various documents and the pleadings and also relied upon some Judgements in support of her contentions that this Court is vested with the jurisdiction to try the case

on hand. She would draw the attention of this Court to the order of the Court of Cassation, wherein the highest Court of Appeal had observed that the order pronounced by Court of appeal that without justifying the illicit non-return of the children to India was erroneous and had therefore remanded back the matter to the Lower Court. She would submit that even before the Courts at France the respondent had taken out the defense that it was only the Courts at India that had jurisdiction to decide on the custody of the children since the family had decided to shift permanently to India and the journey to Europe in May 2013 was only for an holiday and not with an intent to return permanently to Europe. She would rely on the following Judgements in support of her case that the ordinary residence of the minor children was Puducherry, India and not at France.

- i) ***(2011) 6 SCC 479 - Ruchi Majoo Vs. Sanjeev Majoo***
- ii) ***2019 SCC Online Mad 72 - S.Annapoorani Vs. K.Vijay***
- iii) ***2006 (90) DRJ 77 - Paul Mohinder Gahun Vs. Selina***

Gahun

iv) **2015 SCC Online Del 8127 - Surbhi Khanna Vs. V.Amit**

Khanna

Discussion:

17. The entire arguments revolves around the issue as to whether the ordinary residence of the minor children are within the jurisdiction of this Court as provided in Section 9 (1) of the Act, which would read as follows:

"(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"

18. The emphasis therefore was on the words ordinarily resides which clearly excluded places where the minors were staying with no intention of making it a permanent place of residence like for instance a

boarding School, a relatives house etc. From a reading of the facts of this case it appears that the petitioner, respondent and their children were all residing at Belgium and in the year 2012 travelled to Puducherry, India with an intent to settling down there permanently. The reason for the choice appears to be that both the petitioner and the respondent were orphans who were given in adoption at Puducherry. It is also seen that in pursuance of this decision the parties have wound up their establishment at Belgium with the respondent selling his residence and moving over to India. Yet another pointer to this decision is the one way ticket that was booked by the parties.

19. The next instance which would further fortify this decision is the fact that in the month of May 2013 when the applicant, respondent and the children had travelled to Europe on vacation the return ticket was booked back to Chennai. Therefore, the intention of the parties then was to make Puducherry their permanent residence prior to May

2013 when they left for their vacation to Europe.

20. The provisions of Section 9 talks about the ordinarily residing and not a case of permanently residing, the two are different, sometimes the place where the minor ordinarily resides could be his permanent residence. In all the Judgements that have been cited by the applicant the minor whose custody is sought for had been shifted to India / residing in India / living in India. In the case of ***Ruchi Majoo Vs. Sanjeev Majoo***, the mother and the child had shifted to Delhi although they were citizens of United States of America. The father had returned to United States of America and since he had threatened to take away the minor son the mother had moved an application for custody before the Courts at Delhi. The father had challenged the jurisdiction of the Court by stating that the child being United States Citizen was ordinarily residing in USA and had come to India only for vacation. The Honourable Supreme Court discussed the terminology

"ordinarily residing" as found in the Act and elaborated on the march of Law regarding the same starting from the Judgement of **Annie Besant Vs. Narayaniah - AIR 1914 PC 41.**

21. The learned Judges held that the Court at Delhi was the competent Court to hear the case and one of the reasons for holding so was that the child had been living in India and studying in the School at Delhi for over three years and as the father had agreed to move the appellant and the minor to India to enable the wife to explore her career option and the son to get admitted in the School. However, in the case on hand it is the reverse situation the minors have been living and studying in France since September 2013.

22. In the case of **S.Annapoorani Vs. K.Vijay**, the learned Judge had discussed the Judgement of this Court reported in **(2008) 7 MLJ 22 - C.V.Ananth Padmanabhan Vs. Bindu**, were the learned Judge

had observed as follows:

"31. In my considered view, the jurisdiction of this Court to entertain the O.P. did not depend upon the physical availability of the children at Chennai on the date of presentation of the O.P. Even if the applicant had not gone to Hyderabad on 16.02.2008 and brought back the children to Chennai, this Court would have still had jurisdiction to entertain the O.P. for the simple reason that from the dates of their birth in the years 1999 and 2003 respectively, both the minors were ordinarily residing at Chennai till October 2007."

23. In fact the learned Judge had relied heavily on the Judgement of ***Bhagyalakshmi and another v. Narayana Rao*** reported in **1981 TLNJ 451**, wherein, the learned Judge had observed that the question whether the minor was ordinarily residing in a particular place has to be decided on the facts of the particular case and the paternal family house or family residence may normally be taken to be the ordinary

residence of the minors as well. The learned Judge had further observed that the words "ordinarily resides" is incapable of exhaustive definition as it has to be construed according to the purpose for which the enquiry is made. Temporary residence or residence by compulsion however long cannot be treated as the place of ordinary residence. Ultimately, the learned Judge had gone to state that the Jurisdiction of the Court under Clause 17 of the Letters Patent read with Section 3 of the Act would extend even to minors who are ordinarily residing outside this jurisdiction. The case ***S.Annapoorani Vs. K.Vijay*** was one where the father who was residing in Nilgris had removed his minor daughter from the custody of the mother who was residing at Bangalore whereas the petition for custody was filed in this Court. The learned Judge has relied on the provisions of Clause 17 of the Letters Patent read with Section 3 of the Guardians and Wards Act to hold that this Court had the Jurisdiction to hear the matter.

24. In the Judgement reported in **2006 (90) DRJ 77**, the learned Judge had held that it cannot be considered that the minor was ordinarily residing at Delhi since the minor and her parents were citizens of Canada and the minor was staying in a boarding School. In those circumstances, the learned Judge held that the Court at Delhi could not be considered to be the competent Court to decide the petition under Section 9 of the Act.

25. In the instant case from the facts it is seen that the petitioner and the respondent had stayed in Auroville, Puducherry for just a period of one month short of a year. In May 2013, they had left for Europe and thereafter the children who initially spend their time with the respondent at Belgium were taken back to France by the applicant from Belgium. The parties have been contesting the proceedings from the year 2013 in the French Courts. The Children have also been enrolled into the School at France and are studying there for the last 7

years. No doubt the parties had shifted to India with the intention to making it their home. However, less than a year from the date of their arrival the applicant decided to shift the children to France where the children are residing to date. On the date of the filing of this petition the minors have been continuously residing at France for over 6 years and their stay in France is not a temporary stay since the children are residing there and have enrolled in the Schools there since 2013. The respondent had also not moved any application for Guardianship initially though the children had been taken away from his custody. On the contrary, he has been contesting the proceedings at France.

26. The Court of Cassation rescinded the order of the Court of appeal also on the ground that the respondent was a Belgian national and did not have any residence in France. Unlike the facts of the cases cited on the side of the respondent, the minors in this case are for the last 5 years prior to the filing of the petition residing at France and

enrolled into the School there. Therefore, it cannot be stated that the minors are ordinarily residing within the jurisdiction of this Court. It is no doubt seen that an issue of jurisdiction of the French Courts is now pending consideration.

27. Therefore, this Court is not vested with the Jurisdiction. The application is allowed on the ground of want of jurisdiction.

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P.T.ASHA, J.,

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