

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

FAO No. 1218 of 2017 (O&M)

Date of decision : 12.02.2020

Amandeep Singh

.... Appellant

Versus

Rajdeep Kaur

... Respondent

**CORAM : HON'BLE MRS. JUSTICE DAYA CHAUDHARY
HON'BLE MRS. JUSTICE MEENAKSHI I. MEHTA**

Present : Mr. Gaurav Chopra, Advocate for the appellant.

Mr. Ish Puneet Singh, Advocate for the respondent.

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DAYA CHAUDHARY, J.

CM No. 3904-CII of 2017

By way of this application, the applicant/appellant is seeking exemption from filing certified copy of impugned judgment dated 08.11.2016.

Application is allowed as prayed for.

CM No. 3905-CII of 2017

There is delay of 10 days in filing the appeal.

For the reasons recorded in the application, the same is allowed and delay of 10 days in filing the appeal is condoned.

Main appeal

Appellant Amandeep Singh has filed the present appeal to challenge impugned order dated 08.11.2016, whereby the petition filed by

him before the Guardian Judge, Ludhiana has been ordered to be sent to the Court of learned District Judge concerned having jurisdiction over address of the respondent Rajdeep Kaur at Howrah, Kolkata (West Bengal).

Briefly the facts of the case, which have resulted into filing of the present appeal before this Court are that marriage between the parties was solemnized on 13.11.2007 at Ludhiana. After the marriage, both the parties remained in their matrimonial home in village Dhandra, Tehsil and Distt. Ludhiana. A male child namely Karanvir was born on 09.11.2008 in United States of America. There were temperamental differences between the parties, while they resided either in United States of America or in the matrimonial home in village Dhandra. Efforts were made from the side of friends, family members and relatives to settle the matter. Appellant filed a petition under Section 9 of the Hindu Marriage Act, 1955 seeking restitution of conjugal rights before the Court of learned Civil Judge (Sr. Divn.), Ludhiana. A compromise was effected between the parties during pendency of the proceedings and on the basis of that compromise, the petition was withdrawn in the month of December, 2011. Both the parties resided together and the minor child was admitted in BCM School at Ludhiana. Thereafter, again differences arose between the parties. Respondent-wife left the matrimonial home along with the child without consent of the appellant-husband and shifted to Kolkata (West Bengal). A petition seeking custody of the child was filed by the appellant-father before the learned Guardian Judge, Ludhiana on 15.01.2014. The respondent-mother raised an objection regarding territorial jurisdiction. Learned Guardian Judge, Ludhiana, on considering the objection of the territorial

jurisdiction, ordered to send the petition to the Court of Learned District Judge, having jurisdiction at the address of respondent *i.e.* Howrah, Kolkata (West Bengal) vide the impugned order while directing the parties to appear before the transferee Court in due course of time.

Learned counsel for the appellant-father submits that the learned Guardian Judge, without taking into consideration the scope and ambit of Section 9 of Guardian and Wards Act, 1890 (for short – “Act, 1890”), has considered the objection and has observed that the Court at Howrah has the territorial jurisdiction in the matter, whereas the Guardian Court has no power to accept the request of transfer of the case from one State to the other. Learned counsel further submits that the minor child was forcibly taken away from the custody of the appellant-father and as per the provisions of Act, 1890, the petition was maintainable at Ludhiana. Learned counsel also submits that Section 9 of the Act, 1890 is a specific provision with regard to jurisdiction of the Court to entertain a claim to grant custody of a minor. Sub-section (1) of Section 9 identifies the Court competent to pass an order of custody of minor, whereas sub-sections (2) and (3) deals with the courts where the party can approach for guardianship of the property owned by a minor. Learned counsel also submits that for determination of the jurisdiction of the Courts under Section 9 of the Act, the place where the child is ordinarily residing is to be taken into consideration and in the present case, the minor is ordinarily residing in district Ludhiana and for a short period, he was taken by the mother to Kolkata. The minor son was taken away from the custody of the appellant-father without his consent and the impugned order has been passed not only

contrary to the provisions of the Act but without any competency. In support of his arguments, learned counsel for the appellant has relied upon judgment of Hon'ble the Apex Court in case ***Ruchi Majoo Vs. Sanjeev Majoo 2011(3) R.C.R. (Civil) 122*** and judgment of this Court in case ***Parshant Chanana Vs. Mrs. Seema alias Priya 2020 (1) R.C.R. (Civil) 400***.

Learned counsel for the respondent has opposed the submissions made by learned counsel for the appellant on the ground that the welfare of the child is to be taken into consideration as the child is pursuing his studies and is residing with the mother. It cannot be said that he is residing there temporarily. In support of his arguments, learned counsel for the respondent has relied upon judgments in cases ***Amit Kashyap Vs. Pooja 2017 (1) Law Herald 181, Shakuntala Vs. Rajesh 2010 (5) R.C.R. (Civil) 261, Amit Angra Vs. Kanchan 2009(5) R.C.R. (Civil) 625, Anamika Vs. Sumit Sharma 2007(2) PLJ 424*** and ***Smt. Sunita Jain and others Vs. Mittar Sain Jain and another 2003(1) R.C.R. (Civil) 440***.

Heard arguments of learned counsel for the parties. We have also perused the impugned judgment and other documents on the file.

Admittedly, the marriage between the parties was solemnized on 13.11.2007 at Ludhiana. Thereafter, both the parties remained together in their matrimonial home *i.e.* in village Dhandra, Tehsil and Distt. Ludhiana. Respondent-wife left the matrimonial home as certain differences arose between the parties and, thereafter, she shifted to Howrah, Kolkata (West Bengal). Petition under Section 8 of the Hindu Minorities and Guardianship Act, 1956 read with Section 25 of the Guardian and Wards

Act, 1890, was filed by the father before the Guardian Court at Ludhiana. During pendency of the petition, the mother went to her parental home at Kolkata along with the child.

Section 9 of the Guardian and Wards Act, 1890 is relevant for the present controversy in hand which is reproduced as under : -

“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 the 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.”

As per the provisions of Section 9 (1), the application with respect to guardianship of the person of minor is to be made to the District Court having jurisdiction in the place where the minor ordinarily resides *i.e.* at Ludhiana. For determining the jurisdiction of the Court under Section 9 of the Act, the “ordinary residence” of the minor is to be seen. The child was taken away by the mother to Kolkata but it cannot be said that the child was ordinarily residing at Kolkata. Without considering the provisions of the Act, 1890, the petition has been transferred to the Court of learned District Judge concerned having jurisdiction over address of the respondent

Rajdeep Kaur at Howrah, Kolkata (West Bengal), whereas learned Guardian Court has no power to transfer the petition from one State to the other. Not only the relevant provisions of the law have not been taken into consideration but the place of ordinary residence of the minor child has also not been interpreted in the correct sense. It is not within the domain of the Guardian Court to transfer the case from one State to the other.

Admittedly, both the parties cohabited as husband and wife in the matrimonial home situated in village Dhandra, Tehsil & Distt. Ludhiana. There was a compromise arrived at between the parties on 22.11.2011 and as per said compromise they remained together upto 06.12.2013. The minor son was admitted in LKG Class in B.C.M. School, Basant Avenue, Dugri Road, Ludhiana. Thereafter, as per the stand of the appellant, the child was forcibly removed from his custody. Thereafter, the child remained with the mother but during this period the respondent-wife went to Howrah, Kolkata (West Bengal) just to meet her family members. By considering the fact that the child has remained in Howrah, Kolkata (West Bengal), the impugned judgment has been passed. It cannot be said that ordinarily the child was residing in Howrah, Kolkata (West Bengal). The ordinary place of residence can be said where the child was residing with the mother and attending the classes. The Court was not competent to pass order by transferring the case to the Court where it was not having jurisdiction as for determining the jurisdiction of the Court under Section 9 of the Act, the place where child is ordinarily residing is to be taken into consideration. The minor has been residing ordinarily in Distt. Ludhiana but only for a short period he was taken by the mother to Howrah, Kolkata (West Bengal).

As per provisions of Section 9 (1) of the Act, 1890, the application with respect to guardianship of the person of minor is to be made to the District Court having jurisdiction in the place where the minor is residing “ordinarily”. In the present case, the child is residing with the mother and studying in the school in the jurisdiction of Ludhiana. The short stay at Howrah, Kolkata (West Bengal) was while accompanying the mother for a short period, which cannot be termed to be residing “ordinarily”. Moreover, the District Court is having jurisdiction where the child is ordinarily residing *i.e.* at Ludhiana. As per provisions of Section 9(3) of the Act, in case such application is moved to the District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application by taking into consideration the time factor to move before the appropriate Court of jurisdiction. The duty of the Court is to see as to whether the minor is residing “ordinarily” at a place and the application has been moved for custody of the child. The question of jurisdiction is a mixed question of law and fact, but unless the jurisdictional facts are admitted, it can only be a pure question of law capable of being answered without an enquiry into the factual aspects of the controversy. The appeal filed by the appellant should not have been transferred to the Court at Howrah, Kolkata (West Bengal) without having any jurisdiction. As per provisions of Section 9 of the Act, the application in respect to a person of a minor is to be filed at the Court under whose territorial jurisdiction the minor ordinarily resides. In a number of judgments of Hon'ble the Apex Court as well as of this Court, while interpreting Section 9 of the Act, it has been held that a child is sought to “ordinarily” reside at a place where he is

expected to be ordinarily found with his/her natural guardian, but when against the wishes of one of the parents, the child has been sent to other place, it will not be a presumption that the place where the child ordinarily resides has been shifted.

While passing the impugned order, neither any enquiry has been conducted nor it has been held that how the Court at Howrah, Kolkata (West Bengal) will have jurisdiction by considering the ordinary place of residence of the child. The learned lower Court has no jurisdiction to send the application from one State to the other and as such, the impugned order is not only without any jurisdiction but it is also bad in law.

In view of what has been stated above, the present petition is allowed by considering the facts and circumstances of the case and impugned order dated 08.11.2016 is set aside with a direction to learned Guardian Judge, Ludhiana to decide the matter afresh in view of the relevant provisions of law as discussed above and to take fresh decision within a period of three months.

(DAYA CHAUDHARY)
JUDGE

Dated : 12.02.2020
sunil yadav

(MEENAKSHI I. MEHTA)
JUDGE

Whether speaking/reasoned : Yes / No

Whether reportable : Yes / No