

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 574 of 2022

**Smita Ray Saha
Vs
Debmalya Saha**

For the Petitioner	:	Mr. Rwitendra Banerjee Mr. Sandip Kundu Mr. Shibasis Chatterjee Mr. Devdutta Pathak
For the Opposite party	:	Mr. Aniruddha Chatterjee Mr. Debrup Choudhury Mr. Rishabh Ahmed Khan Mr. Gopal Krishna Maity
Heard on	:	09.02.2023
Judgment on	:	23.02.2023

Ajoy Kumar Mukherjee, J.

1. This is an application under section 24 of the code of Civil Procedure 1908 at the instance of the wife/petitioner seeking transfer of a proceeding under the Guardian & Wards Act, 1890 (hereinafter called as Act VIII case) being No.3 of 2022 pending before the court of learned District Judge Paschim

Bardhaman at Asansol to the court of learned District Judge North 24 Parganas at Barasat. Petitioner contended that she was married with the opposite party on January 31st , 2010 under the provisions of Special Marriage Act. The parties are blessed with a male child. Petitioner alleged that since 14th August, 2021, the petitioner with the minor child was constrained to leave her matrimonial residence at Durgapur and started residing at her parental home at New Town , Kolkata. She was also compelled to resign from her job at Durgapur and currently she is unemployed, having no independent income of her own. The minor child studying at DAV Model School at Durgapur and continuing his study with online classes from the petitioner's parental home at New Town. The petitioner further stated that finding no other alternative she had to prefer an application seeking dissolution of marriage under section 27 of the Special Marriage Act 1954 being Mat Suit No. 2342 of 2021 against opposite party which is now pending in the court of learned Additional District Judge, 1st Court Barasat. The petitioner alleged that while petitioner was in her parental home, the opposite party during the time of visiting said child had openly threatened that he shall take forcibly custody of the child. In view of above, in the said divorce proceeding, considering welfare of the child, she was constrained to file an application under section 38 of the Special Marriage Act 1954, seeking an order of temporary injunction, restraining opposite party and his family members from taking forceful custody of child without due process of law. Said application came up for consideration before the said court and learned court was pleased to restrain the opposite party from taking forceful

custody of the child without due process of law vide order dated November 10,2021. The opposite party entered appearance and has filed an application for vacating the interim order, which is pending for disposal.

2. The petitioner also states that currently she is unemployed and is in acute financial distress and thus constrained to prefer an application seeking maintenance in the said suit for dissolution of marriage. The petitioner's application seeking maintenance came up for consideration before the said court on March 9th, 2022, when the learned court was pleased to direct both the parties to file affidavit of assets.

3. The petitioner submits that pending said application for dissolution of marriage against the opposite party in Barasat court, opposite party has filed aforesaid Act VIII case seeking custody of child in the court of District Judge, Paschim Bardhaman at Asansol. In the said proceeding the opposite party has also filed application seeking production of minor child before the said court. The petitioner argued that the petitioner is a resident of New Town within the judgeship of Barasat Court and petitioners aforesaid suit for dissolution of marriage as well as application under section 38 of the Special Marriage Act is pending where the opposite party has appeared and contesting but the opposite party with evil motive and in order to harass the petitioner has deliberately initiated aforesaid separate proceeding before the court at Asansol, Paschim Bardhaman. In this context, her further case is that under the provisions of section 9 (1) of the Guardians and Wards Act 1890, the court at Asansol, Paschim Bardhaman cannot have any jurisdiction to hear the said

proceeding as the ward is ordinarily residing with the petitioner within the jurisdiction of Barasat Court. Furthermore the issue involved in the application under section 38 of the Special Marriage Act 1954 filed by the petitioner in the said suit for divorce is similar and identical to the proceeding initiated by the husband /opposite party in Act VIII case. Under such circumstance, if two contradictory orders are passed in two separate proceedings having similar identical issue, there shall be traversity of justice. The petitioner further submits that it is extremely inconvenient for her and the minor child to attend the proceeding before the learned court at Asansol, which situates at a distance of 250 k.m. from the petitioners parental home. The petitioner has no relative or alternative accommodation at Asansol, where she can stay overnight. Accordingly the petitioner has prayed for aforesaid transfer.

4. The opposite party/husband has filed affidavit in opposition and denied all material allegations. The opposite party submits that the minor son when attained the age of 5 years, he was admitted by father /opposite party at DAV Model School Durgapur and till now said minor child is continuing his study in that school. The opposite party alleged that the main seed of separation between the opposite party and petitioner wife was due to extra marital relationship of the petitioner/ wife with another person which broke peaceful conjugal life of the opposite party. In order to break the ice the opposite party and his family members tried their level best to protect the marriage bonding but the petitioner and her parents are not eager to restore the relation. The petitioner is now taking all possible steps to shield the child so that he cannot

meet his father. The Misc. Case No. 220 of 2021 filed by the petitioner/wife under section 125 of the code of criminal procedure indicates that she does not have the financial capacity to maintain the minor child properly. Upbringing of the child at the present residence of the petitioner/wife is not proper and the same is likely to affect studies and his mental condition. He further alleged that the proper education health and the welfare of the said minor son has been jeopardized as the petitioner has employed an 'Aaya' to look after said minor son, because she is incapable to take proper care of the son and as such the development of the healthy brain of the minor child will not be possible due to lack of care and negligence. The act of petitioner/wife has been tantamount to removal of the said minor from lawful custody of the opposite party. The opposite party is interested to maintain the minor child at his own home and to give him the best education and he has also means to bear the financial responsibility. Furthermore the minor son has also been deprived of love and affection of his grand father and grand mother. Accordingly the best interest and welfare of the minor child demands that the said minor should be placed under the custody of the respondent/opposite party immediately being the father and the natural guardian of the minor child, who is legally entitled to get the custody.

5. The opposite party further submits that the conduct of the petitioner/wife appears to be suspicious, inconsistent and *malafide* because she is trying to impress upon the court, that the minor has been residing at New Town by showing the Adhaar Card of the minor but the ordinary place of

residence of minor is at Durgapur where he has a regularly settled home and wherefrom he is perusing his education and “ordinary place of residence” cannot be the place of stay, where the minor is obliged to dwell due to force of circumstances. Accordingly he contends since the minor is ordinarily residing at Durgapur since his birth and is pursuing his study in a premier School at Durgapur, the minor’s ordinarily place of residence should be construed within the jurisdiction of learned District Judge Paschim Bardhaman at Asansol. Accordingly he has prayed for dismissal of the aforesaid application. The petitioner by filling affidavit in reply denied the allegations leveled by husband/opposite party in his affidavit in opposition.

6. It is undisputed that prior to the present Act VIII proceeding initiated by the husband /opposite party, the petitioner filed application under section 38 in relation to the custody of the child before the Additional District Judge 1st Court at Barasat and opposite party herein appeared and contesting said proceeding from time to time.

7. Accordingly the only question that needs to be ascertained in the present case is whether learned District judge, North 24 Pargana’s jurisdiction is the place where “minor ordinarily resides” or not. The learned counsel appearing on behalf of the petitioner argued that the petitioner left her matrimonial house with no intention to come back and presently residing at her parental house and as such, the former place that is her matrimonial house, where she used to live with the ward seizes to be ward’s ordinarily place of residence and his parental house has now become his ordinary place of residence.

8. Section 9 of the Guardians and wards Act, 1890 runs as follows:-

“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.”

9. Accordingly section 9 of the Act VIII of 1890 provides for the court having jurisdiction to entertain application regarding guardianship of minor. The prayer for declaration of guardianship and the prayer seeking custody of a minor though two distinct concept, yet are co-related and interdependent. For the purpose of guardianship, section 9 of the said Act provides that the application shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

10. The word “residence” means dwelling in a place for some continuous time. The words “minor ordinarily resides” in section 9(1) of the Act means more than a temporary residence and connotes a regularly settled home, but does not include a place or stay where the children are obliged to dwell by force of circumstances or compulsion of parents.

11. In the present case, petitioner/wifes’ specific case is since August, 14, 2021, the petitioner with the minor child residing at her parental home at New Town, Kolkata -156, under the judgeship of Barasat Court, district North 24 Parganas. Such fact has not been denied or disputed by the opposite party in

his affidavit-in-opposition, Opposite party/Father's contention is that though minor on temporary basis residing with the mother /petitioner but his original and permanent place of residence is at Durgapur under the judgeship of Paschim Bardhaman. This is because after birth till taken away the minor from his ordinary place of residence, the minor was residing at Durgapur. Even minor is still continuing his studies from DAV Model School at Durgapur and minor's Ration Card is at Durgapur which was issued on 29.12.2019. The Aadhar Card in the name of minor showing his present temporary residence, is in fact a fabricated document. Accordingly opposite party's argument is since the minor was born in Durgapur and pursuing his studies in School at Durgapur, so minor's ordinary place of residence is at Durgapur, which is his regularly settled home and place of taking education and not the place of stay, where the minor is obliged to dwell by force of circumstances.

12. Needles to say that "residence" is a matter of fact and not a matter of presumption. Thus where the ward is living for much more than one year with his mother, he must be deemed to reside ordinarily at New Town, Kolkata. Though I am not unmindful that the expression "ordinarily resides" connotes a regularly settled home and not a place of stay where the child is obliged to dwell by force or due to compulsion but In this case there is no specific assertion or prima facie evidence that the child has been forcefully removed from the custody of the father or for creating jurisdiction, child has been removed or kept temporarily at the time of filing application, rather petitioner has specifically submitted that she has returned to her parent's home without

having any intention to return and for which she has filed aforesaid suit for dissolution of marriage.

13. It may be reiterated that section 9(1) of the Act does not speak of “should have resided”. It has nothing to do with the legal entitlement respecting residence of the minor. If the legislature intended that the residence of the mother or the father of the child should determine the ordinary residence of the child, it should have used expression to that effect. When legislature used and specified the expression “minor ordinarily resides” which is unambiguous, certain and clear, then it must mean the actual, physical place and not a legal or constructive residence. In the case in hand child ordinarily resides at a place of his mother’s care and custody, which is not illegal, that place must be construed as minor’s ordinary place of residence and as such court at place where minor was only born and stayed some time, does not have jurisdiction to entertain the said proceeding.

14. Furthermore in the present case, the Barasat Court has already passed an injunction order in connection with an application under section 38 of the special Marriage Act, 1954 filed by the petitioner, and said court is in session over similar identical issue, which is also prior one. As such, I am of the view that if the said two proceedings namely prayer under section 38 and Act VIII proceeding are tried and disposed of by different courts, then there might be possibility of conflict of judicial opinion and it is highly expedient that both the proceedings are heard by the same court, where the issue raised first by the petitioner.

15. There is one more aspect in the present case. It is not in dispute that court at Asansol situates at a distance of about 250k.m. from the petitioner's present place of residence and if the present prayer for transfer is refused, then petitioner will have to travel said distance along with the child, in order to produce the child before the said court as sought for by the opposite party. The very nature of Act VIII of 1890 tend to show that the court has to supervise the work of the guardian and not to remove it's watchful eyes from the minor, in order to ensure that the ward's welfare is being looked after by the guardian/custodian. Therefore it is expected that the trial court should not be far away from minor's place of ordinary residence. The ward has to be easily accessible as far as possible to the trial court as much as the court should be accessible to the guardian/custodian in the welfare of the ward and that is why legislature in it's wisdom has used the expression "minor ordinarily resides" will create the jurisdiction of court.

16. Considering all the aforesaid facts and circumstances of the case C.O. 574 of 2022 is allowed. The learned District Judge, Paschim Bardhaman at Asansol is hereby directed to withdraw Act VIII case no. 3 of 2022 pending before the court of learned District Judge Paschim Bardhaman at Asansol and to transmit the same to the court of learned District Judge North 24 parganas at Barasat within a period of the three weeks from the date of communication of the order, who in turn will transfer the same to the court of learned Additional District Judge, 1st Court, Barasat where petitioner's Matrimonial suit being No. 2342 of 2021 under section 27 of the Special Marriage Act

1954 is pending and both the proceeding may be heard analogously in order to avoid conflict of judicial decisions, over self same issue.

17. The transferee court shall serve notice upon both the parties intimating next date of hearing, before proceeding further with the Act VIII case and will proceed from the stage, where it reached till date.

18. There will be no order as to costs. Department is directed to send a copy of this order to learned District Judge, Paschim Bardhaman and learned District Judge, North 24 Parganas immediately.

19. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)