

30-11-2023
Court No.3
Sh/12.

**In The High Court At Calcutta
Jalpaiguri Circuit Bench**

C.O. 138 of 2023

Smt. Pritisha Chakraborty
-Vs-
Sri Tanmay Das.

Mr. Debasish Kar (through V.C.),
Mr. anirban Banerjee.

For the petitioner.

Mr. Subhasish Misra,
Mr. Swarup Das,
Mr. Satyajit paul,
Mr. Ajoy Chakraborty.

For the opposite party.

1. This is an application under Section 24 of the Code of Civil Procedure seeking transfer of Misc. Guardianship Case No.14/2023, pending before the Court of District Judge, Cooch Behar to the learned Court of Additional District Judge, Baarrackpure.
2. The petitioner contended that the opposite party herein filed an application under Section 25 of the Guardian & Wards Act stating therein that the petitioner herein is the legally married wife of the opposite party/husband, which was registered on 23-11-2007 and due to such wedlock a male child was born on 21-11-2019. Thereafter due to dispute and discord, both the parties started residing separately since 20-03-2023 and the said child is now residing with his mother i.e, the petitioner herein. The petitioner/wife further submits that she has already initiated a criminal proceeding against the opposite party/ husband/father under Section 498A/506/34 of the IPC which is now pending

before the Court of learned Additional Chief Judicial Magistrate, Barrackpore.

3. The petitioner further submits that she had also initiated maintenance proceeding under Section 125 of the Cr.P.C., being Misc. Case No.371 of 2023 where the opposite party appeared and the said maintenance proceeding is pending before the learned 3rd Court, Judicial Magistrate, Barrackpore.
4. The petitioner further submits that she had no source of income of her own and she is residing at her paternal house and the said child is now aged about 4 years and as such it is not possible for her to attend the said proceeding at Cooch Behar Court and accordingly she has prayed for aforesaid transfer.
5. Mr. Misra, learned counsel appearing on behalf of the opposite party submits that the child was born in Cooch Behar and Cooch Behar is the child's permanent residence. He further submits that the minor's ordinary residence as stated in Section 9 (1) of the Act VIII of 1890 does not mean temporary residence but it means permanent residence and as such Section 9(1) should be interpreted in favour of the opposite party herein. In this context he relied upon judgment of a co-ordinate Bench of this Court in Dipika Agarwal Nee Khaitan Vs. Rishi Agarwal 2020 2 DMC 104.
6. He further submits that the Court of Barrackpore situates at a distance of about 700 kms from Cooch Behar. Moreover, the opposite party being the father is getting deprived from visitation right of the child since March 2023, when the petitioner herein had left her matrimonial home along with the child.

7. I have considered the submissions made by both the parties.

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. Needles to say that "residence" is a matter of fact and not a matter of presumption. Thus where the ward is living since March, 2023 with his mother, he must be deemed to reside ordinarily at his mother's place. 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.
12. It is not in dispute in the present case that the child is aged about 4 years and presently residing in Barrackpore area with her mother at least since March, 2023. The word "ordinarily resides" as appearing in Section 9(1) of the Guardians and Wards Act, 1890, should not be interpreted in such a way that the child aged about 4 years has to travel a distance of about 700 kms one way to attend each day's Court proceeding at Cooch Behar, without taking into account the welfare of the child. It is not in dispute that the other two proceedings initiated by the petitioner/wife/mother herein is

pending at Barrackpore Court and it is also not in dispute that in the said proceedings in Barrackpore Court the opposite party would be required to attend to conduct the said proceedings.

13. Since the Legislature has created a specific jurisdiction by enactment of law as envisages under Section 9(1) in the Act of 1890, I find that the jurisdictional Court of the present dispute can only be the Court having jurisdiction in the district of North 24-parganas where the child is residing with his mother.
14. In such view of the matter learned District Judge, Cooch Behar is directed to withdraw the proceeding being Misc. Guardianship Case No.14 of 2023 pending before the learned District Judge, Cooch Behar and to transmit the same to the Court of learned District Judge, North 24-Parganas at Barasat who in turn shall transfer the same in a competent Court having jurisdiction to try the said proceeding nearest to a court, where the child resides at present at the given address with his mother within a period of four weeks from the date of communication of this order. The transferee Court shall proceed from the stage where it reaches till date. The transferee Court shall serve notice upon both the parties before proceeding further with the said case.
15. Registry Circuit Bench at Jalpaiguri is directed to communicate this order to the learned district Judge, Cooch Behar and learned District Judge North 24-Parganas at Barasat immediately.
16. C.O. 138 of 2023 is accordingly disposed of.
17. Urgent Photostat certified copy of this order, if applied for, be supplied to the learned advocates

appearing for the parties on compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)