



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**APPEAL FROM ORDER NO. 1 OF 2022
CIVIL APPLICATION NO. 18 OF 2022 IN AO/1/2022**

Shivhari s/o. Gajanan Mante,
Age 45 Years, Occu. Service,
R/o. Sai City, Nidhona Road,
Jalna, Taluka and District Jalna

.. Appellant
(Original Plaintiff)

Versus

Sau. Sushama w/o. Shivhari Mante,
Age 39 years, Occu. Service,
R/o. Sai City, Nidhona Road,
Jalna, Taluka and District Jalna,
At present Residing at Dusarbid,
Taluka Sindkhed Raja,
District Buldhana

.. Respondent
(Original Defendant)

Mr. S. L. Jaybhaye and Mr. Sanket S. Kulkarni, Advocates for
Appellant;
Mr. Himmatsinh D. Deshmukh, Advocate for Respondent

CORAM : S. G. MEHARE, J.

DATE : 19-12-2023

PER COURT :-

1. Heard the learned counsel for the appellant and the learned counsel for the respondent.
2. The appellant is a father, and the respondent is a mother of the wards. The father had filed an application for custody of son and daughter running 13 and 7 years, respectively. Admittedly, the children are residing with the mother at Dusarbeed, Taluka Sindkhedraja, District Buldhana. In paragraph No.4, it has been pleaded that on 03.03.2011, the respondent/mother took the son

illegally with the help of police from his custody. He filed Miscellaneous Civil Application No.43 of 2020 on 17.06.2018. However, the application was rejected. Since the wards do not reside within the Jalna Court's territorial jurisdiction, the objection was filed under Section 9(1) of the Guardians and Wards Act 1890. The learned District Judge-3, Jalna, allowed the application (Exhibit-12) and returned the plaint under Order VII, Rule 10 of the Code of Civil Procedure, for presenting it to the appropriate Court. The applicant /husband/father has impugned the said order before this Court.

3. The learned counsel for the appellant argued that the learned District Judge-3, Jalna, erred in interpreting the term "where the minor ordinarily resides". The children were taken forcefully from the custody of the father. Before taking the minors forcibly with the mother, they were residing with him. Hence, the learned District Judge-3, Jalna, erred in believing the respondent that they were not residing within the territorial jurisdiction of the Jalna Court. Reading the application, he argued that the Jalna Court had jurisdiction to entertain the petition as the wards/minors ordinarily resides within its jurisdiction.

4. Per contra, the learned counsel for the respondent submits that the pleadings of the applicant reveal that his son has not been in his custody since 2011. There are no specific pleadings regarding the cause of action. It is barely pleaded in a single line.

The cause of action and the ordinary place of residence of children are distinct.

5. 'Ordinary residence' does not mean the residence at the time of application; rather, the minor's recent removal from the place where they ordinarily resides would render nugatory the provision of Section, if the cognizance of the case is taken. The place where the guardian resides cannot be presumed to be the place where the minor ordinarily resides. Where the minor is found to be residing with any one of the parents, it may be right to question of the constructive custody and the minor having no permanent abode must be deemed to be ordinarily resident of the place where he actually resides. The purpose of using the expression 'where the minor ordinarily resides' is probably to avoid the mischief that the minor may be stealthily removed to a distinct place, even if he forcefully kept there. The application for minor's custody could be filed within the jurisdiction of the District Court from where he had been removed or in other words, the place where the minor would have continued to remain, but for his removal.

6. It has been argued that the minor/child was taken away from the custody of the father. However, it was the incident that happened in 2011. Since 2011, he has been residing with his mother. It is not a case that he has been recently removed from the custody of the father. Considering the period of stay with the

mother, it is held that he has been settled where his mother was residing. As a natural guardian, the mother was taking care of both children. Nothing is on record that the minors were stealthily removed to a distinct place. Reading the plaint, as a whole, the cause of action does not determine the jurisdiction of the Court. Section 9 of the Guardians and Wards Act provides that any application with respect to the guardianship of the person of the minor is to be filed with the District Court having jurisdiction in the place where the minor ordinarily resides. The facts of the case, as pleaded in the application, explicitly prove that when the application was filed, the minors were ordinarily residing outside the jurisdiction of the Jalna District Court.

7. Considering the law and facts, this Court is of the view that the learned District Judge-3, Jalna, has correctly allowed the application (Exhibit-12). There is nothing to interfere with the impugned order.

8. Hence, for the above reasons, the appeal from the order stands dismissed.

9. Pending civil application stands disposed of.

(S. G. MEHARE)
JUDGE