

2023:PHHC:068670

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR-1204-2023 (O&M)

Date of Decision: May 11, 2023

Sumit Verma

...Petitioner

Versus

Jyoti Soni and another

...Respondents

CORAM: HON'BLE MRS. JUSTICE ARCHANA PURI

Present: Mr.Sandeep Berwal, Advocate
for the petitioner.

Mr.L.K.Gollen, Advocate
for respondent No.1.

ARCHANA PURI, J.

Challenge in the present petition is to the order dated 02.11.2022 passed by learned Principal Judge, Family Court, whereby, an application under Order 7 Rule 10 read with Section 151 CPC, filed by the petitioner for rejection of petition under Section 25 of the Guardians and Wards Act, was dismissed.

The material facts, as culled out from the paperbook are that marriage of the petitioner (husband) with respondent No.1(wife) was solemnized on 10.06.2019, according to Hindu Rites and Ceremonies at Rewari. After the marriage, the petitioner and respondent No.1 lived

together as husband and wife at Jind. From their wedlock, a male child was born on 25.04.2020.

However, after some time, the parties fell apart. On the accusations of demand of dowry, FIR No.39 dated 26.06.2020 was got registered at Women Police Station, Rewari against husband (petitioner) and his parents and the same is still pending adjudication. Even, a petition under Section 125 Cr.P.C. was filed by respondent No.1(wife) against her husband and the same is also pending before Family Court, Rewari. However, during the course of the proceedings, the petitioner and his parents felt sorry for their conduct and thereupon, respondent No.1(wife) along with minor child had accompanied the petitioner and started residing at Jind. During the stay at Jind, the respondent gave birth to second child and when she was admitted in the maternity hospital, her parents and brother had come to Jind. The petitioner and his parents had subjected parents and brother of respondent No.1 to beatings, on the basis whereof, an application was given to SHO, Civil Line, Jind. Also, it is the claim of respondent No.1(wife) that the petitioner and his mother, had forcibly snatched minor child Viyansh, from her legal custody, while Viyansh was only 1 year and 8 months old child.

Thereupon, petition under Section 25 of the Guardians and Wards Act was filed by respondent No.1(wife), thereby, seeking custody of the minor child Viyansh. The aforesaid petition was filed at Family Court, Rewari. During the pendency of the aforesaid petition, an application was filed by the petitioner under Order 7 Rule 10 read with Section 151 CPC, for

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seeking rejection of the petition, on the ground that child Viyansh, born from the wedlock of the parties to the lis, is ordinarily residing at Jind with his father and therefore, the Courts at Rewari, do not have jurisdiction to try the aforesaid petition for custody. Also, it was stated that respondent No.1(wife) has no permanent residence at Rewari and now, respondent No.1, states that she is resident of Jaipur.

However, in the reply, it was averred that as per Section 6 of the Hindu Minority and Guardianship Act, the custody of child below 5 years, would ordinarily lie with the mother. Also, it was stated that it was only under constrained circumstances, when respondent No.1(wife) was not allowed to enter the matrimonial home with newly born child, she was constrained to go to her parental home with newly born child. In fact, her elder son Viyansh was kept by the husband (petitioner) and since, he was less than 5 years old, therefore, she had sought custody of minor child Viyansh.

Now, it is submitted by learned counsel for the petitioner-husband that since the minor child is residing presently at Jind, therefore, any petition to seek his custody, ought to be filed, at the Family Court, Jind and Family Court, Rewari, where, the petition, as such, has been filed by respondent No.1-wife, has no jurisdiction to deal with the petition.

However, while placing reliance upon '*Akshay Gupta vs. Divya and others, 2021(1) RCR (Civil) 722*', decided on 11.01.2021, taking into consideration the age of the child, to be less than 5 years and considering his custody, to be with the mother, the said application was dismissed.

For seeking custody under Section 9 of the Guardians and Wards Act, 1890, the place where minor is residing presently, would not be a determining factor in deciding the jurisdiction. But, it is the constructive custody, prior to arising of the cause of action for claiming such custody, which could decide the jurisdiction of the Court and that any change of ordinary residence, which might be temporary or under compelling circumstances, cannot be the ordinary residence of the minor for determining jurisdiction to apply for custody of the minor from the custody of the other.

As per Section 6 of the Hindu Minority and Guardianship Act, even though, the natural guardian of the Hindu minor, in respect of his person as well as in respect of his property is concerned, the same is taken to be his father, in case of boy or unmarried girl and after father, the mother is next in the row, but however, there is proviso that custody of the minor, who has not completed age of 5 years, shall ordinarily be with the mother.

Thus, it is mandatory that a child below the age of 5 years has to reside ordinarily with the mother, then the expression '**minor ordinarily resides**', has to be interpreted to mean the residence of the mother. In other words, the residence of the mother would follow the residence of the son.

A bare reading of the aforesaid provision under Hindu Minority and Guardianship Act, denotes that qua a child less than 5 years, there is a legal presumption with regard to natural guardianship, vis-a-vis, '**minor's person and minor's property**' both being in favour of mother. Considering it to be so, in decision in *Akshay Gupta's case (supra)*, it was

held by the Court that the benefit of legal presumption of guardianship would also ensure therewith, all the other consequential rights arising therefrom, including the legal presumption qua custody of a minor below five years in favour of his/her mother. In the aforesaid decision, reliance was also placed upon observations made by the Court in ***Tejbir Singh vs. Baljit Kaur, CR-7257, decided on 02.11.2018***, wherein, it was held that ‘that the custody of the child below 05 years of age (especially a female child), would naturally lie with the mother and therefore, the deemed custody would be with the mother, even if actual custody was with the father’.

In this pretext, in ***Akshay Gupta’s case (supra)***, at the time of institution of the proceedings before Family Court, it was held that mother was the deemed natural guardian of minor child. Therefore, the natural custody would also be presumed to be with mother, regardless of the place, where the child was actually residing physical, at that time.

Reverting to the case in hand. Undisputedly, the proceedings for seeking custody of the minor child Viyansh, who was less than 5 years, were initiated at Family Court, Rewari. Also, it is not disputed between the parties that at the relevant time, minor child Viyansh was residing at Jind with the present petitioner. From the facts, as observed aforesaid, the child was less than 5 years old, at the relevant time. At that time, the mother(respondent No.1) had specifically stated herself to be resident of Rewari, though, now it is submitted that respondent No.1 is presently residing at Jaipur. To so substantiate this claim, much reliance has been

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placed upon one complaint under Domestic Violence Act, filed at the instance of respondent No.1(wife), which is pending in the Court of ACJM, Jaipur, wherein, she had mentioned her residence as Jaipur. However, it is to be noted that copy of the said petition has been annexed as Annexure P-4. A close perusal of the said complaint reveals that respondent No.1 has mentioned herself to be permanent resident of Sector-3, Rewari, though, she has mentioned her temporary address as that of Jaipur.

During the course of arguments, it has been assiduously submitted that respondent No.1, is doing law and after filing of the petition, she had temporarily shifted to Jaipur. To so establish her permanent residence at Rewari, various documents, as such, have been brought on record. Vide CM-4701-CII-2023, respondent No.1 has placed on record, her residence certificate, voter card, driving licence etc., which depict about her to be permanent resident of Rewari. Not only this, it is further pertinent to mention that there is other litigation also, which is already pending, between the parties to the lis at Rewari. Petition under Section 125 Cr.P.C. has been filed by respondent No.1-wife before the Courts at Rewari. Even, FIR No.39 dated 26.06.2020 under Sections 498-A and 406 IPC, was got registered at Rewari.

Though, during the course of arguments, it is submitted that an application was filed before SHO, Civil Line, Jind, but however, it is pertinent to mention that it is the specific claim of respondent No.1-wife, as pleaded in the petition under Guardians and Wards Act, about present petitioner along with his mother, to have forcibly snatched the minor child,

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from the legal custody of respondent No.1, while Viyansh was only 1 year and 8 months old. Thus, it was under constrained circumstances that application was filed at Jind, which also should be taken into consideration.

Not only this, even, petition under Section 13 of the Hindu Marriage Act, was filed by the petitioner against respondent No.1. This petition relates to year 2022 and in the same, the residential address of respondent No.1 has been mentioned as that of Rewari. The summons, so dispatched to respondent No.1-wife on 23.01.2023, specifically depicts about the summons to have been sent to Rewari. In these circumstances, when in the divorce petition itself, the petitioner has mentioned respondent No.1-wife, to be resident of Rewari, it cannot be concluded that Family Court, Rewari has no jurisdiction and that in fact, the custody petition, ought to have been filed before Family Court, Jind. Not only this, even considering the fact of the respondent No.1-wife to be resident of Rewari, petition under Section 13 of the Hindu Marriage Act, filed by the petitioner, which was pending in the Court of Principal Judge, Family Court, Jind, was transferred to Family Court, Rewari, vide order dated 09.03.2023.

Besides the same, considering the constrained circumstances, as per the allegations levelled in the petition about the minor child to have been forcibly snatched from the legal custody of respondent No.1-wife, the words '**ordinarily resides**' would not connote a temporary or forced house, to which the minor has been removed, either by stealth or by compulsion. In the case in hand, the minor child was snatched from the legal custody of the

mother. In the given circumstances, by no stretch of imagination, the minor can be considered to be ordinarily residing at Jind.

Thus, as observed aforesaid, the child is in deemed custody of the mother and the petition was filed at Rewari, of where respondent No.1- wife, at the time, was the permanent resident of Rewari, therefore, Family Court, Rewari, does have the jurisdiction to proceed further in the custody petition.

In the given circumstances, learned Family Court, Rewari, has rightly dismissed the application. As such, the impugned order calls for no interference. Hence, the revision petition is hereby dismissed.

May 11, 2023
Vgulati

(ARCHANA PURI)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
Yes/No