



IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

CMPMO No. 436 of 2020

Date of Decision 2nd January, 2021

Diwakar Dutt

...Petitioner

Versus

Kamlesh Kumari @ Anju & another

....Respondents

Coram

The Hon'ble Mr. Justice Vivek Singh Thakur, J.

Whether approved for reporting?¹ Yes

For the Petitioner:

Mr. Romesh Verma, Advocate,
through Video Conferencing.

For the Respondents:

None.

Vivek Singh Thakur, J.

Petitioner had approached the Family Court, Shimla by filing a petition under Section 25 of Guardian and Wards Act 1890 (in short 'the Act'), against his wife and one other, for the custody of his minor son.

2 Learned District Judge/Family Court vide impugned order dated 3.11.2020 has returned the petition preferred by petitioner along with documents for its presentation before the appropriate Court of law with observation that matter is not

¹ *Whether Reporters of Local Papers may be allowed to see the judgment? Yes*

within jurisdiction of his Court as minor son is not residing within jurisdiction of his Court. Reliance has also been placed by Family Court on a pronouncement of High Court of Allahabad in case of ***Dr. Vinay Samuel Arawattigi vs. Principal Judge, Family Court, Kanpur reported in AIR 2007 Allahabad 13.***

3 Being aggrieved by aforesaid order passed by Family Court, Shimla, petitioner has approached this Court and has relied upon judgments passed by Apex Court in ***Ruchi Majoo vs. Sanjeev Majoo, reported in (2011)6 SCC 479;*** and also pronouncements of different High Courts in ***Ramesh Bhardwaj vs. Ram Saran Dass, reported in (1998-3) 120 P.L.R.35;*** ***Bhagyalakshmi and another vs. K. Narayana Rao reported in AIR 1983 Madras 9;*** and ***Hariom Ram Pratap vs. Sunil reported in AIR 2011 Rajasthan 138.*** He has also relied upon judgment of Allahabad High Court, in support of his plea, which has been relied upon by Family Court for returning the petition.

4 Impugned order has been passed at the initial stage without issuing notice to respondent. Therefore, I am of the opinion that in present petition also, issuance of notice to respondent is not necessary as no order has been passed by Family Court on merits, but, the petition filed by petitioner has been returned for its presentation before the appropriate Court of law.

5 Provisions of Section 9 of the Act, relevant to present case, prescribing jurisdiction to entertain the application are as under:-

“9(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”

6 Discussing the meaning and scope of expression “where the minor ordinarily resides”, the Supreme Court in Ruchi Majoo’ case (referred supra) has observed as under:-

“24. It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under [Section 9](#) of the Act is the ‘ordinary residence’ of the minor. The expression used is “Where the minor ordinarily resides”. Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy.

25. The factual aspects relevant to the question of jurisdiction are not admitted in the instant case. There are serious disputes on those aspects to which we shall presently refer.

26. We may before doing so examine the true purpose of the expression 'ordinarily resident' appearing in [Section 9\(1\)](#) (supra). This expression has been used in different contexts and statutes and has often come up for interpretation. Since liberal interpretation is the first and the foremost rule of interpretation it would be useful to understand the literal meaning of the two words that comprise the expression. The word 'ordinary' has been defined by the Black's Law Dictionary as follows:

"Ordinary (Adj.) :Regular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances; belonging to, exercised by, or characteristic of, the normal or average individual."

The word 'reside' has been explained similarly as under:

"Reside: live, dwell, abide, sojourn, stay, remain, lodge. (Western- Knapp Engineering Co. V. Gillbank, C.C.A. Cal., 129 F2d 135, 136.) To settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically, to be in residence, to have an abiding place, to be present as an element, to inhere as quality, to be vested as a right. (State ex rel. Bowden v. Jensen Mo., 359 S.W.2d 343, 349.)"

In Websters dictionary also the word 'reside' finds a similar meaning, which may be gainfully extracted:

"1. To dwell for a considerable time; to make one's home; live. 2. To exist as an attribute or quality with in.

3. To be vested: with in"

28. In *Annie Besant vs. Narayaniah*, AIR 1914 PC 41 the infants had been residing in the district of Chingleput in the Madras Presidency. They were given in custody of Mrs. Annie Besant for the purpose of education and were getting their education in England at the University of Oxford. A case was, however, filed in the district Court of Chingleput for the custody where according to the plaintiff the minors had permanently resided. Repeating the plea that the Chingleput Court was competent to entertain the application their Lordships of the Privy Council observed:

"...The district court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act 1890. By the 9th Section of that Act the jurisdiction of the court is confined to infants ordinarily residing in the district. It is in their Lordship's opinion impossible to hold that the infants who had months previously left India with a view to being educated in England and going to University had acquired their ordinary residence in the district of Chingleput."

In *Jagir Kaur and Anr. v. Jaswant Singh* AIR 1963 SC 1521, this Court was dealing with a case

under Section 488 Cr.P.C. and the question of jurisdiction of the Court to entertain a petition for maintenance. The Court noticed a near unanimity of opinion as to what is meant by the use of the word "resides" appearing in the provision and held that "resides" implied something more than a flying visit to, or casual stay at a particular place. The legal position was summed up in the following words: (AIR p. 1524, para 8)

".....Having regard to the object sought to be achieved, the meaning implicit in the words used, and the construction placed by decided cases there on, we would define the word "resides" thus: a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case....."

20. In *Kuldip Nayar & Ors. Vs. Union of India & Ors.* Reported in 2006 (7) SCC 1, the expression "ordinary residence" as used in the Representation of People Act, 1950 fell for interpretation. This Court observed:

"243. Lexicon refers to *Cicutti v. Suffolk County Council* (1980) 3 All ER 689 to denote that the word "ordinarily" is primarily directed not to duration but to purpose. In this sense the question is not so much where the person is to be found "ordinarily", in the sense of usually or habitually and with some degree of continuity,

but whether the quality of residence is "ordinary" and general, rather than merely for some special or limited purpose.

244. The words "ordinarily" and "resident" have been used together in other statutory provisions as well and as per Law Lexicon they have been construed as not to require that the person should be one who is always resident or carries on business in the particular place.

245. The expression coined by joining the two words has to be interpreted with reference to the point of time requisite for the purposes of the provision, in the case of Section 20 of the RP Act, 1950 it being the date on which a person seeks to be registered as an elector in a particular constituency.

246. Thus, residence is a concept that may also be transitory. Even when qualified by the word "ordinarily" the word "resident" would not result in a construction having the effect of a requirement of the person using a particular place for dwelling always or on permanent uninterrupted basis. Thus understood, even the requirement of a person being "ordinarily resident" at a particular place is incapable of ensuring nexus between him and the place in question."

31. Reference may be made to *Bhagyalakshmi and Anr. v. K.N. Narayana Rao* AIR 1983 Mad 9, *Aparna Banerjee v. Tapan Banerjee* AIR 1986 P&H 113, *Ram Sarup v. Chimman Lal and Ors.* AIR 1952 All 79, *Smt. Vimle Devi vs. Smt. Maya Devi and Ors.* AIR 1981 Raj. 211, and in re: *Dr. Giovanni Marco Muzzu and etc. etc.* AIR 1983 Bom. 242, in which the High Courts have dealt with the meaning and purport of the expressions like 'ordinary resident' and 'ordinarily resides'

and taken the view that the question whether one is ordinarily residing at a given place depends so much on the intention to make that place ones ordinary abode.”

7 The Punjab and Haryana High Court in Ramesh Bhardwaj's case (referred supra) has observed and held as under:-

“8.It is true that the minor's ordinary place or residence necessarily may not be a place where his father who is the natural guardian resides, as held by the Andhra Pradesh in the case of Harihar Parshad Jaiswal (supra) and the Saurashtra High Court in the case of Bai Shri Arun Kumari (supra). In the case of Sarda Nayar (supra) decided by a Division Bench of the Kerala High Court also, it was observed that the place of ordinary residence of the minor would be the place where the minor would have continued to reside but for the recent removal of the minor to a different place.

9. In the present case, as stated in the earlier part of the judgment, the minor children were ordinarily residing at Chandigarh till their mother died on 28th June, 1996 and their father who is the natural guardian was arrested on the basis of the FIR lodged by the petitioner. The said minors were handed over to the petitioner during the proceedings of Criminal Writ Petition No. 890 of 1996 as the respondent who is the natural guardian was in custody. The respondent immediately after his release, filed

Criminal Writ Petition No. 1706 of 1996 for the custody of the minor children and after he was relegated to civil remedy, he filed an application under [Section 25](#) of the Act. From these facts, it is clear that the minor children would have continued to live in Chandigarh but for the fact that they were handed over to the petitioner in the facts and circumstances of the case. In view of these facts, I am of the opinion that the Courts in Chandigarh have jurisdiction to entertain and try the present application filed by the respondent under [Section 25](#) of the Act.”

8 Madras High Court in Bhagyalakshmi’s case (referred supra) has held as under:-

“7....The words 'ordinarily resides' would in my view connote, a regular, normal or settled home and not a temporary or forced one to which a minor might have been removed either by stealth or by compulsion. The place of residence at the time of the filing of the application under the Act does not help to ascertain whether a particular court has jurisdiction to entertain the proceedings or not, as it would be easy to stifle proceedings under the provisions of the Act by the mere act of the moving the minors from one place to another and consequently from one jurisdiction to another. The question whether the minors were ordinarily residing in any particular place has to be primarily decided on the facts of the particular case. The paternal family

of the house of the family residence may normally be taken to be the place of ordinary residence of the minors as well. The words 'ordinarily resides' are incapable of any exhaustive definition as those words have to be construed according to the purpose for which the enquiry is made. The intention of not reverting back to the former place of residence would normally be relevant; but in the case of the minors, it is rather difficult to impute any such intention to them. It has also be borne in mind that mere temporary residence or residence by compulsion at a place however long, cannot be equated to or treated as the place of ordinary residence. Bearing in mind these considerations, it is necessary to ascertain from the materials available in this case as to where the minors 'ordinarily resided' for purpose of the Act.....”

9 The Rajasthan High Court in Hariom Ram Partap's case has held:-

“9. It is not the place where the minor is presently residing when application seeking custody is filed under Section 9 of the Act. which would be determinative of deciding the jurisdiction of the Court under Section 9 of the said Act, but it is factually as well as constructive custody prior to arising of cause of action for claiming such custody again, which could decide the jurisdiction of the Court under Section 9 of the Act. Merely because in the circumstances that upon death of mother of the

child, the child was removed from the custody of the father who is the natural guardian of the minor and was taken away by the maternal grandfather and was therefore, living away at different place at Gurgaon, that would not take away the jurisdiction of the Court at Nohar, where the father-natural guardian ordinarily resides and prior to the death of mother of the child, the child with his mother also used to live.

10. In these circumstances, in present case after having filed the application under Section 9 of the Act for claiming custody of the child at Nohar, even though the child was removed from the custody and was taken away by maternal grandfather to Gurgaon, Court at Nohar cannot be said to be lacking jurisdiction in the matter and therefore, the application under Order 11 Rule 7 CPC filed by maternal grandfather was rightly rejected by learned Court below.”

10 Even in Dr. Vinay Samuel Arawattigi's case, relied upon by the Family Court for returning the petition, Allahabad High Court has also observed:-

“13. All these catena of judgments, which have been quoted above are clear and categorical that only said District Court has jurisdiction to proceed with the matter under the Guardians and [Wards Act](#) within whose territorial jurisdiction the minor "ordinarily resides". The question as to whether said minor "ordinarily resides" within the territorial jurisdiction of aforementioned District Court is essentially question

of fact. When issue is sought to be raised in this respect, then burden of proving that minor "ordinarily resides" within the territorial jurisdiction of aforementioned District Court lies with the applicant, who is moving an application before the District Court and Court will have to decide this question on the basis of the evidence adduced and the facts and circumstances of each case. The court will have to see by way of evidence as to whether pleadings, which have been set up qua forceful deprivation of custody are rightful pleadings or same has been mentioned only for the purposes of conferring jurisdiction. Jurisdiction cannot be permitted to be usurped and the question ordinary place of residence of minor, when it is pleaded has been forcibly shifted has to be decided on the basis of the evidence adduced and the material available on the record qua the intention with which minor has been removed, the period with whom minor has been residing and all other relevant factors.

13-A.....Last residence, is not at all the relevant criteria and consideration for conferring jurisdiction, for the purposes of Section 9 of Guardian and [Wards Act](#) and to the contrary, Court within whose jurisdiction minor ordinarily resides is the only relevant criteria for conferment of jurisdiction . Pleadings qua ordinary place of residence of minor at Kanpur is conspicuously missing and to the contrary pleadings on its own suggest, that minor is ordinarily residing at Miraj. In paragraph 8 respondent has admitted, that on 2nd birthday of Simran ,

Respondent went to Miraj and participated in the same. Residence of minor at Miraj has not at all been disputed.”

11 After going through judgment of Allahabad High Court in Dr.Vinay Samuel case, referred supra, it is apparent that it was observed by said Court that in that case pleadings qua ordinarily place of residence of minor at Kanpur were conspicuously missing and to the contrary, pleadings on its own were suggesting that minor was ordinarily residing at Miraj, Whereas, in present case, it has been specifically pleaded in petition that minor was admitted in Modern Public School at Sanjauli at the age of 3½ years and at present, he is student of 5th class in said school and petitioner and respondent No.1, wife of petitioner, were living with their son at Sanjauli till June, 2020 and it is only on 6th June, 2020 when respondent No.1 ran away with respondent No.2 and also took minor son Lakshay along with her without knowledge and consent of petitioner.

12 I am in agreement with principle propounded in aforesaid judgments that to determine the place of ordinarily residence with reference to provisions of Section 9 of the Act, place of ordinarily residence of minor would be the place where minor would have continued to reside but for recent removal of minor to different place and the words “ordinarily resides” would

connote, a regular, normal or settled home and not a temporary or forced one to which a minor might have been removed either by stealth or by compulsion and place of residence at the time of the filing of petition under the Act does not help to ascertain whether a particular Court has jurisdiction to entertain the proceedings or not as it would be easy to stifle proceedings under the provisions of the Act by the mere act of moving the minors from one place to another and consequently, from one jurisdiction to another.

13 In present case, to determine the jurisdiction of Court present place of residence of minor is not relevant but the place of residence of minor prior to arising of cause of action for claiming custody of minor child would decide the jurisdiction of Court under Section 9 of Act. While passing the impugned order, Family Court has failed to appreciate the provisions of Section 9 of Act and material on record in its right perspective and has also applied the ratio of law of pronouncement relied upon by him under wrong perception.

14 For material available on record and discussion herein-above, I am of the considered opinion that appropriate Court of law for filing the petition by petitioner for custody of his minor son is Family Court, Shimla.

15 In view of above, impugned order is quashed and set aside and petitioner is directed to present his petition before the District Judge/Family Court, Shimla on 7th January, 2021 either in person or through counsel. Thereafter learned District Judge/Family Court shall consider the matter in the light of aforesaid discussion and proceed further by passing an appropriate order in accordance with law.

16 It is made clear that findings and observations with respect to facts and effect thereof made herein above, are based on material available on record and in case, issue of jurisdiction is disputed by respondents by placing on record further relevant material, the said issue shall be decided by the Court uninfluenced by observations of this Court made in herein with respect to facts and effect thereof but undoubtedly based on ratio laid down in this judgment.

17. The petitioner is permitted to produce copy of order downloaded from the High Court website and the trial Court shall not insist for certified copy of the order, however, they may verify the order from the High Court website or otherwise.

Petitions stand disposed of.

Dasti copy on usual terms.

January 02, 2021
(ms)

(Vivek Singh Thakur)
Judge