

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

Appeal Against Order (A.O.) No. 43/2017

Appellant/(Original Petitioner):-

Shri Prakash Balkrishna Naidu,
aged about 42 yrs., Occ. Legal
Practitioner, R/o. 244,
Chhatrapati Nagar, Nagpur.

Versus

Respondent/(Original Respondent):-

Sou. Shashanka Prakash Naidu,
aged about 34 yrs., Occ. Nil,
R/o. D.No.4-457/A, Nava Bharat
Nagar, near Bommuru Junction,
Rajmundry (Rasta) East
Godawari District, Andhra
Pradesh.

Shri V. V. Bhangde, Advocate for appellant.
Shri G. L. Bajaj, Advocate for respondent.

CORAM : S. B. SHUKRE, J.

DATE : 19.12.2017.

Oral Judgment :

Heard finally by consent of both the parties.

2. Admit.

3. This appeal is preferred against the order dated
12.09.2017 passed by the learned Judge, Family Court No.2
Nagpur. By this order, the learned Judge returned the petition

holding that the Family Court at Nagpur does not have jurisdiction to try the petition filed under Sections 7, 12 and 25 of the Guardians and Wards Act, 1890 seeking orders as to guardianship, interim protection and custody of the minor, a daughter, aged about 7 years. Therefore, the petition came to be returned to the appellant for it's being presented to a Court having jurisdiction over the issue involved in the petition, which in the opinion of the Family Court No. 2, Nagpur was District Court, Rajamundry, Andhra Pradesh.

4. I have gone through the paper book of the case which is part of this appeal and also the impugned order. I have heard learned counsel for the appellant and the learned counsel for the respondent. The only point that arises for my determination is:-

“Whether the family court at Nagpur has jurisdiction to try the petition?”

5. According to the learned counsel for the appellant, the impugned order is illegal and therefore, it deserves to be quashed and set aside. He submits that since birth, the minor child of the parties was a resident of Nagpur and that she even pursued her education at Nagpur till she was removed unilaterally and illegally from the custody of the appellant by the respondent. The date of removal of the minor from the

custody of the appellant was of 21.11.2016, as submitted by the learned counsel for the appellant. He submits that Section 9(1) of the Guardians and Wards Act 1890 confers the jurisdiction over that Court which is situated at a place where the minor ordinarily resides. In the fact situation of this case, he further submits, the ordinary place of residence of minor could not have been anything else but Nagpur. He also submits that even as regards the issue of jurisdiction of Nagpur Court, the Hon'ble Supreme Court did not think that Nagpur Court had no territorial jurisdiction when it dismissed the Transfer Petition bearing Transfer Petition (Civil) No. 95/2017 filed by the respondent seeking transfer of the petition from Nagpur Court to Rajamundry Court, Andhra Pradesh by its order dated 14.02.2017. So, he further submits that the preliminary objection taken by the respondent on the territorial jurisdiction of Nagpur Court was barred by principle of res judicata.

6. Shri Bajaj, learned counsel for the respondent submits that there is no need for any interference with the impugned order. He submits that it is an admitted fact that after minor was shifted to Rajamundry by the respondent, the minor was admitted to a School at Rajmundry and that now she is residing at Rajamundry. He submits that the expression "ordinarily resides" used in Section 9(1) of the Guardians and

Wards Act has to be understood in the context of the intention of the parties and in a case like this, intention would be that of a mother i.e. the respondent, with whom the minor is residing. He also submits that there is nothing like inter-parental kidnapping and at the most, the shifting of minor as in the present case, could be considered to be relocation of the minor, done for minor's welfare and better future. He points out that the Law Commission has proposed a new bill to make suitable amendments to the Guardians and Wards Act so as to allow relocation of minor in order to achieve the ultimate object of securing his/her welfare. On the submission of the issue being decided by the Hon'ble Apex Court and bar of res judicata, he submits that basically the transfer application could not be considered to be a suit and that the respondent had never taken any preliminary objection on territorial jurisdiction of the family court at Nagpur before the Hon'ble Apex Court and therefore, the principle of res judicata cannot come into play in the present case.

7. Section 9(1) of the Guardians and Wards Act lays down that it is that District Court where the minor ordinarily resides which will have the jurisdiction under the Act. In the case of **Ruchi Majoo Vs. Sanjeev Majoo reported in (2011) 6 SCC 479** relied on by both the sides, Hon'ble Apex Court has held that Section 9(1) prescribes a solitary test for

determining the issue of jurisdiction and it is of “ordinary residence” of the minor which is primarily a question of intention which in turn is a question of fact. In the case of **Prashant Chanana Vs. Seema @ Priya reported in AIR 2010 Punjab and Hariyana 99** , the learned Single Judge of Punjab and Hariyana High Court has held that words, “ordinarily resides” mean regular, normal, settled home or a regular place of abode and not temporary or forced stay. In the case of **Hariom Ram Pratap Vs. Sunil reported in AIR 2011 Rajasthan 138**, it is held that ordinary residence of minor means the residence of minor prior to his removal from custody of his father rather than present place of residence. In the case of **Ramnivas Bansilal Sharma & ors. Vs. Shakuntalabai Bansilal Sharma & ors reported in 2015(6) Mh.L.J. 932** , the learned Single Judge of this Court also took the same view, when he held that when a minor is removed from one place and taken to another place in questionable circumstances, the place where he is so taken would not be considered as the minor's residence. Same view has been taken by the learned Single Judge of Delhi High Court in **Amrit Pal Singh Vs. Jasmit Kaur reported in AIR 2006 Delhi 213**. The learned single Judge of Delhi High Court described in this case unilateral shifting of residence of minor by one of the parents as “inter-parental kidnapping” and

observed that it would not take away the jurisdiction of the Court at former place from where the minor was taken away. Even in the case of **Dinesh Prasad s/o. Late Saryug Sah Vs. Reena Soni W/o Dinesh Prasad d/o. Sri Ram Lakkan Soni & ors reported in 2010 SCC Online Pat 2085** , Patna High Court points out by following the law laid down by the Hon'ble Apex in the case of of **Union of India Vs. Dudh Nath Prasad reported in 2000(1) PLJR (SC) 71**, that the expression “ordinarily resides” has to be understood with reference to an intention to stay at that place for considerably long time and it would not include a flying visit or a short or casual presence at that place. Similar view is expressed in the case of **Kamal Maini Vs. Natasha @ Mona & ors. reported in 2015 SCC Online P & H 12445.**

8. The sum and substance of the discussion made in the earlier paragraph is that in order to determine the issue of territorial jurisdiction, only thing that a Court is required to do is to find out where the minor ordinarily resides. The ascertainment of the place of ordinary residence of minor would depend upon the intention of the parties and the intention of the parties, cannot be ascertained just from the perspective of only one of the parents. It has to be taken to be an intention expressed by both the parents upto the point the issue of jurisdiction is decided or where father and mother

are at loggerheads, it has to be taken as intention of that parent who, in law, can be considered to be entitled to the custody of the child or where the question of custody is subjudice, it has to be taken as intention of both the parents upto the point when differences between them arose.

9. In the present case, there is no order passed by any Court about granting of custody to either of the parents so far. Therefore, this Court would have to ascertain from the facts present on record as to what was the intention of both the parents upto the point of discord occurring between them so that the question of ordinary place of residence of the minor can be resolved appropriately.

10. The admitted facts present on record, in my view, throw a clear light on the intention of the parents till the minor was shifted, and they are stated now. The minor, in the present case, a daughter, was born at Nagpur on 03.08.2010 and till 21st November, 2016, the minor resided at Nagpur. The minor had her education both in school and kindergarten at Nagpur. The minor was, when she was taken away on 21st November, 2016, studying in 1st standard of primary school at Nagpur which was named the "Centre Point School, Nagpur" and her admission in this School continues even today. The minor was taken away from the custody of the appellant,

without his consent, on 21.11.2016 and then, the minor was admitted to a School of Rajamundry, Andhra Pradesh again unilaterally. Presently, the minor is actually studying at Rajamundry, Andhra Pardesh. The appellant now, is also seeking custody of the minor, apart from his being appointed as her guardian.

11. These admitted facts clearly show as to what was the intention of the appellant and the respondent since the birth of their daughter in the year 2010 till 21.11.2016 when the respondent unilaterally took away the child from Nagpur and relocated her at Rajamundry in what was to be her own move disapproved by the appellant. Their intention, since birth of the child till the point of discord occurring between them thus, was to keep the child at Nagpur only for all purposes; residential, developmental and educational thereby making Nagpur as ordinary residence of their minor daughter. The act of shifting of minor from Nagpur to Rajamundry by the respondent, being without consent of the appellant, was unilateral and hardly expressive of the intention of the parents, as understood by law. This being so, Rajamundry cannot be seen as a place where the minor ordinarily resides or the minor would have interest to adopt it as her ordinary place of residence eventually, at least for the present. If there is any evidence led suggesting another inference, it would be

a different matter. But, that would depend upon what evidence is ultimately adduced by the parties and that could be only when the case is tried on merits. But, till that happens, the admitted facts would reasonably demonstrate that the ordinary place of residence of the minor in the present case is none other than the city of Nagpur.

12. This brings me to the other submission of the learned counsel for the respondent. There is a 257th report submitted by the Law Commission. Perusal of the report shows that the Law Commission has come out with a concept of relocation of child and would prefer to term shifting of child from one place to another as relocation of the child, as long as it is in the best interest of the child. The Law Commission has also proposed a bill for giving legal effect to the concept of relocation and the draft bill is annexed to the report. The learned counsel for the respondent would submit that even in the present case, the shifting of the minor must be viewed as her relocation done to secure her welfare, and should not be her termed as “inter-parental kidnapping”,. I would say, in the first place, the shifting has not been seen by me as “inter-parental kidnapping” and in the second place, the concept of relocation itself has not been legally born as proposed by the Law Commission. So, this Court can not consider the proposition and put it into practice. Presently, going by the

settled law and admitted facts, discussed earlier, I find that the ordinary place of residence of the minor in the present case is of Nagpur.

13. There is also an argument made about the applicability of principle of res judicata and its non-applicability by rival parties. However, I do not see that there is any need for this Court to go into this aspect of the case. This matter can be decided only on the basis of Section 9(1) of the Guardians and Wards Act and the facts established on record and infact, has been decided accordingly.

14. Learned counsel for the respondent has also relied upon some more cases which are as follows:-

- (I) Sushil Kumar Mehta Vs Gobind Ram Bohra (dead) & ors reported in (1990) 1, SCC 193.
- (II) Zuari Cement Ltd. Vs. Regional Director, Employees' State Insurance Corporation, Hyderabad & ors. Reported in (2015) 7 SCC 690.
- (III) Cantonment Board & anr. Vs. Church of North India reported in (2012) 12 SCC 573

These cases lay down a principle that doctrine of res judicata cannot be applied to determine the issue of jurisdiction in a case where it is considered to be a pure question of law. There can be no dispute about this principle of law, but as I said earlier, the dispute involved in this appeal being capable of resolving by applying the solitary test of

“ordinary residence” of minor prescribed in Section 9(1) of the Guardians and Wards Act and has been accordingly decided, there is no occasion for me to consider application or otherwise of the said principle here in this case.

15. On going through the impugned order, I find that the trial court did not consider the afore stated material aspect of the case which has resulted in the trial court misguiding itself and coming to a conclusion which is contrary to the settled principle of law. The impugned order, therefore, requires interference by holding that the family court at Nagpur has jurisdiction to try the petition as filed by the appellant. The point is answered accordingly.

16. In the result, the appeal is allowed. Impugned order is hereby quashed and set aside. The trial court is directed to decide the petition in accordance with law. Parties to appear before the trial court on 19th January, 2018.

JUDGE

Gohane