

RAJASTHAN HIGH COURT

Acharya Shri Kundan Maharaj

Vs.

Smt. Indra

D.B. Civil Misc. Appeal No. 668 of 2003
(N. Mathur and O.P. Bishnoi, JJ.)

16.12.2003

JUDGMENT

N.N. Mathur, J.

1. This is an appeal under Section 19 of the Family Courts Act directed against the judgment dated 13.08.2003 dismissing the appellants' application under Section 25 of the Guardians and Wards Act, 1980 (hereinafter referred to as "the Act of 1980") on the ground of lack of jurisdiction.
2. The appellant who are the grandfather and grandmother of the minor children named Rohit aged 6 years and Mohit aged 5 years filed an application under Section 25A of the Act of 1890 in the Family Court, Jodhpur for the custody of their grand children. Their son Purandass married the first respondent Smt. Indra on 18.11.1994 at Jodhpur. Out of their wedlock, two sons whose custody is in question namely Rohit and Mohit were born. Unfortunately, Poorandass died on 9.8.1999. On his death, his wife Smt. Indra was given an appointment on compassionate ground in Municipal Corporation, Jodhpur. After some time she got her services transferred to Municipal Corporation, Jaipur. She permanently left her matrimonial home at Jodhpur and settled at Jaipur. She has contracted a second marriage with second respondent Krishna Kumar. Out of second wedlock, she gave birth to a female child.
3. It is alleged that both children namely Rohit and Mohit are not treated well by the second husband of Smt. Indra. It was further stated that the appellants have sufficient energy and means to maintain their grand children thus, for the welfare of both the children, they sought their custody from the first and second respondent. In spite of notice, both the respondents did not appear before the Family Court. The first appellant examined himself as PW1, Geeta as PW2 and Jitendra Kumar as PW3. The

learned Judge of the Family Court found that Smt. Indra left Jodhpur on 24.07.2000 when she was transferred to Jaipur. At that time, the age of Rohit and Mohit must be 3 years and 2 years respectively. After the death of father, Mst. Indra being the mother is the natural guardian of both the children particularly after the death of her husband. Children are living with the mother since their birth. In the opinion of the Judge, Family Court, both the children are residing at Jaipur with their natural guardian and, as such, in view of the provisions of Section 9 of the Guardians and Wards Act it is only the Jaipur Court which has jurisdiction to entertain the application.

4. It is submitted by the learned counsel that since both the children last resided with their parents and grandparents at Jodhpur and, thereafter, they were removed from Jodhpur to Jaipur, therefore, their ordinary place of residence within the meaning of Section 9 of the Act of 1890 is at Jodhpur. It is further submitted by the learned counsel that a place of residence after the removal has no relevance. The learned counsel has placed reliance on the decision of the Madras High Court in *Bhagyalakshmi and Another v. K. Narayana Rao*, and another decisions of Bombay High Court in *Re : Dr. Giovanni Marco Muzzu and etc.*,² It is further stated that the decision of the learned Single Judge of this Court in *Tilak Raj Kapoor v. Smt. Asha Kapoor*,³ does not lay down a correct law. The learned counsel has referred to a decision of Gauhati High Court in *Amal Saba v. Smt. Basana Saha*,⁴ wherein it is held that court has to ignore recent removal of minor, if any, from place where minor ordinarily resides. In order to appreciate the contention, it would be convenient to read the relevant provisions of law, as follows:

"Section 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 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.

Section 25. Title of Guardian to Custody of Ward. - (1) If a ward leaves or is removed from the custody of a guardian of his person, the court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by Section 100 of the Criminal Procedure Code, 1882.

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."

5. As far as the judgment of the learned Single Judge of this Court in *Tilak Raj Kapoor v. Smt. Asha Kapoor* (supra) is concerned it is held therein that test which the legislature has provided is that the court which has jurisdiction for hearing an application is a court where the minor "ordinarily resides" and with whom the minor must be deemed to have been in constructive custody. The learned counsel has not been able to point out as to how the said proposition of law is incorrect. It is a different thing whether the said case has an application to the facts of the instant case. Similarly, as far as the Gauhati case is concerned, the observation is made in the context of a recent removal. In the said case two minor sons resided with their parents at place 'G' during 1980 to 1984. The wife deserted the husband in the year 1984. Thus, the children were put in hostel at place 'D' from where the petitioner took them away to a place at 'C' on 23.06.1985. The petition for guardianship was filed by the wife on 29.08.1985. In these circumstances, it was held that the court at 'G' where the minors were ordinarily residing had jurisdiction to try the proceedings. Thus, what is held in that said case is that place of residence has to be determined by finding out as to where the minor was ordinarily residing and where such residence would have continued but for the recent removal of the minor to a different place.

6. The learned counsel has heavily relied upon the Madras case wherein it is held that the residence of the minors with their mother at her maternal home, though for some years had necessarily to be regarded as a temporary one or under compulsion or force of circumstances and could not, therefore, be regarded as their ordinary place of residence, this connotes the idea of a settled home. The court found that the father's

place was an ordinary place of residence. This case is clearly distinguishable. In the instant case, the father of the children is dead. Therefore, the question of returning of children to their father's house does not arise.

7. On careful consideration of the relevant provisions of law and the cases cited we are of the view that the question whether the minors were ordinarily residing in any particular place must be decided on the facts of each case. The paternal family house of the family residence may normally be taken to be the place of ordinary residence of the minors as well. However, the word "ordinary residence" has to be construed according to the purpose for which the enquiry is to be made. If there appears no chance of children reverting back to the former place of residence, this would be a very important relevant fact. Mere temporary residence or residence by compulsion, 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 the case as to where the minors ordinarily resided for the purpose of the Act. In the instant case, the mother has permanently settled at Jaipur. She has contracted another marriage. There are no chance of her returning to Jodhpur. In these circumstances, the ordinary place of residence of minor children is Jaipur and not Jodhpur.

8. Thus, we do not find any infirmity in the finding of the Family Court rejecting the application on the ground of lack of jurisdiction. The appellants may present the application under Section 25 of the Act of 1890 before the court of Judge, Family Court, Jaipur.

9. In view of the aforesaid, we find no merits in the instant appeals and the same stands dismissed.

Appeals dismissed.

Cases Referred.

1. AIR 1983 Mad 9
2. (AIR 1983 Bom 242)
3. (1978 RLW 458)
4. (AIR 1988 Gau 22)