RAJASTHAN HIGH COURT

Wazid Ali

Vs.

Rubina Bano

C. R. P. No. 28 of 2007
(R.C. Gandhi, J.)

22.11.2007

JUDGEMENT

R. C. Gandhi, J.

1. This Revision Petition has been preferred against the order dated 9-2-2007 passed in an Application No. 203/2006, by the District and Sessions Judge, Jhunjhunu (hereinafter referred as 'the Trial Court'), whereby application filed by the petitioner under Section 10 of the Guardians and Wards Act, 1890 (hereinafter referred as 'the Act of 1890') has been dismissed observing that the Trial Court has no jurisdiction to entertain the application.

2. The revision petition has been preferred against the impugned order on the ground that the Trial Court has not properly appreciated the facts and the law and came to erroneous conclusions observing that the Trial Court has no jurisdiction whereas it is asserted that the Trial Court has the jurisdiction as the child was ordinarily residing within the jurisdiction of the Trial Court and seeks to set aside the impugned order.

3. Heard learned counsel for the parties and perused the record.

4. Wazid Ali, petitioner and Smt. Rubina Bano, respondent No. 1 contracted marriage on 26-10-1998. They resided at their matrimonial house at Jhunjhunu. A child, Ayyanali was born out of the wedlock on 14-6-2003. Some misunderstanding developed between the spouses and the relations strained and gradually worsened. The respondent No. 1 left the house of the petitioner along with the child and started living with her parents. Ultimately the petitioner dissolved the marriage on 6-3-2006 by serving Talak upon the respondent No. 1. The child at the time of the dissolution of

the marriage was of 2 years and 8 months and living with his mother. Smt. Hussain Bano, is the mother of the respondent No. 1, Smt. Rubina Bano, who is a permanent resident of Sikar and temporarily living at Bombay with her husband, who is running his business at Bombay. Smt. Rubina Bano, respondent No. 1 contracted another marriage with one Tanveer Ahmed on 20-8-2006. Noticing this development, on 31-8-2006 an application under Section 10 of the Act of 1890 was filed by the petitioner for custody of the minor child. The respondents filed the reply to the application presented by the petitioner before the Trial Court stating that the child is living with the maternal grandmother, Smt. Hussain Bano who is looking after the interest and welfare of the child but no plea of jurisdiction of the Court to entertain the application of the petitioner was raised. The Trial Court during the course of the proceedings directed the respondents to cause the appearance of the child in the Court. At that stage, the respondents filed an application stating therein that the Trial Court has no territorial jurisdiction to entertain the application as the child is living at Bombay which is his ordinary residence in terms of Section 10 of the Act of 1890.

5. It is also stated in the bar that on 11-9-2006, before filing objections to the application presented under Section 10 of the Act of 1890 by the petitioner, the respondent Smt. Hussain Bano, maternal grand-mother of the child, having his custody, filed an application under Section 125, Cr. P. C. for grant of maintenance for the child before the Magistrate at Jhunjhunu. The child has been handed over to the respondent No. 3, Smt. Hussain Bano, because of the compulsion of the re-marriage by the respondent No. 1, Smt. Rubina Bano. Smt. Hussain Bano, respondent No. 3 stated in the application that she is living at Sikar and the child is under her care and custody as her daughter has re-married to one Tanveer Ahmed and handed over the child to her for the welfare and nourishment of the child and for that reason the child need maintenance from his father. This application thereafter has been withdrawn by the respondents.

6. Learned counsel for the respondents has submitted that the question of jurisdiction has rightly been decided in accordance with law by the learned Trial Court as the Court had no jurisdiction as the child is living at Bombay with his maternal grandmother and not at Jhunjhunu. In rebuttal to the plea of the learned counsel for the respondents, learned counsel for the petitioner has drawn the attention of the Court to the Vakalatnamas (power of attorneys) filed before the Trial Court by respondent No. 3 Smt. Hussain Bano as well as before this Court wherein she has shown her permanent residence at Sikar and temporary residence at Bombay.

7. According to the learned counsel for the petitioner, the Talak has been conveyed by post to the respondent No. 1 Smt. Rubina Bano. The respondent No. 1 on the contrary has filed written Talaknama duly signed by the parties which has been disowned by the learned counsel for the petitioner. Learned counsel for the petitioner has also placed on record a document which is framed in the shape of "Ikrarnama/Declaration". It is the statement of the respondent No. 1 only and according to the petitioner it has been received by him by post.

8. Learned counsel for the respondents has also submitted that the certified copy of the application presented by respondent No. 3 under Section 125, Cr. P. C. is not on the record of the appeal, therefore, it cannot be taken into consideration. He is right in his plea. Unless it is brought on the record, it cannot be appreciated by the Court. However, under the provisions of Evidence Act, judicial notice can be taken of the document by the Court as it has not been denied by the respondent that application containing such averments has not been filed by them.

9. The only legal aspect of jurisdiction of the Court to entertain the application has been dealt with by the trial Court and raised before this Court also. The Court has to determine as to whether the Trial Court has the jurisdiction to try the application under Section 10 of the Act of 1890. The Trial Court could have entertained the application, had the petitioner made out that the child was having his ordinary residence within the jurisdiction of the Trial Court. The ordinary residence could not mean to be living at a place at the time of the presentation of the application but should have been living permanently there.

10. This is a peculiar case where on dissolution of the marriage, the child being of the age of 2 years 8 months was taken by the mother and according to the Principles of Mahomedan Law also the mother has right to retain the custody of the child till the age of 7 years or till re-marriage. On the re- marriage, the mother of the child handed over the child to the maternal grand-mother of the child and not to the father of the child, natural guardian. According to the learned counsel for the petitioner in terms of Section 256 of the Principles of Mahomedan Law by Sir Dinshah Fardunji Mulla, the mother after the re-marriage is not entitled to retain the custody of the child. For convenience Section 256 is extracted and reads as under:

> "256. Right of mother to custody of infant children - The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues

though she is divorced by the father of the child (c), unless she marries a second husband in which case the custody belong to the father (d).

Nature and extent of right of hizanat (custody) - In Imambandi V. Mutsaddi (e), their Lordships of the Privy Council said : "It is perfectly clear that under the Mahomedan Law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni Law) is the legal guardian."

It would appear from the passage quoted above that the father is the primary and natural guardian of his minor children, and that the right of custody of the mother and the female relations mentioned in Section 257 below is subject to the supervision of the father which he is entitled to exercise by virtue of his guardianship. If so, the right of hizanat does not carry with it all the powers which a guardian of the person of a minor has under the Guardians and Wards Act, 1890. See note to Section 260, "Father as guardian of his minor children."

11. The mother has deprived herself to retain the custody as she has re- married to second husband. The custody of the minor in such a case belongs to the father, natural guardian and not to the maternal grandmother. Under the Principles of Mahomedan Law, the maternal grand-mother is not entitled to retain the custody of the child.

12. Learned Trial Court has come to the conclusion that the Court at Jhunjhunu has no jurisdiction as the child is not living within the jurisdiction of that Court.

13. It is admitted case of the respondents that the mother of the child has remarried and in the event of re-marriage, the custody of child has been transferred to the maternal grand-mother who lives at Sikar permanently and temporarily at Bombay which is evident from the power of attorneys executed in favor of the advocates filed before the Courts, including this Court, representing Smt. Hussain Bano in whose care and custody the child is. It is to be seen from the facts attending to this case as to whether the ordinary residence of the child could be at Bombay or Sikar where he is living in the custody of the maternal grand-mother or at Jhunjhunu where his father lives.

14. Learned counsel for the respondents to make out that the child is living at Bombay has placed on record along with the application before the Trial Court a certificate dated 31-1-2007 issued by Amrut Nagar Resident Welfare Association, certifying that Master Ayyanali is in good and stable condition and attending the school. This certificate is neither from the authority of the Government nor from the School and

thus do not have that much evidentiary value. It has also not been proved by the respondents providing opportunity to the petitioner of cross-examine that under what circumstances this certificate came to be issued. Respondents have also placed on record a prescription dated 29-1-2007 issued by the Doctor stating therein that child being minor, is physically fit and not suffering from any disease. This certificate has been issued at Bombay. These certificates could be issued as the maternal grand-mother has been living there temporarily and the child is under her custody. Bombay cannot be said to be ordinary residence of the child for the simple reason that the maternal grand- mother of the child has herself stated in the application under Section 125, Cr. P. C. and as recorded in the power of attorneys filed before the Courts that her permanent residence is at Sikar and present residence is at Bombay.

15. Learned counsel for the respondents has also relied upon the judgment delivered in the case title *Pooja Bahadur v. Uday Bahadur,* [1] which deals with the custody of the child. In this case, the children were living with the father at Delhi. The mother of the children filed application at Chandigarh for the custody of the children. The mother went up to the Supreme Court and the Supreme Court while disposing of the application observed as under:-

> "4. The appeal arises out of an appellate order of the High Court of Punjab and Haryana at Chandigarh, taking the view that custody proceedings by the mother would lie in the Guardians and Wards Court at Delhi and not in a Court at Chandigarh. As the minor children are residing with the father at Delhi no fault can be found with that order.
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> 5. We, therefore, while disposing of this appeal, direct the transfer of custody proceedings from Chandigarh Court to be filed before Guardians and Wards Court, Delhi/District Court, Delhi. The District Court, Delhi shall proceed to deal with this matter at its earliest convenience and may decide the same on its own merits, after hearing the parties in these proceedings."

16. Learned counsel for the petitioner has also relied upon the judgments in support of his plea. He has submitted that the respondents in their application under Section 125, Cr. P. C. have admitted with regard to the residence of the respondent No. 3 Smt. Hussain Bano at Sikar and this evidence has to be read against them unless they in law come out of this admission. Learned counsel for the respondents in reply has submitted that since application is not on record, therefore, he cannot be permitted to raise this legal plea. As observed earlier, it is not denied by the respondents that such an application has been filed by them which contain the admission with regard to the

permanent residence. Any statement made in incidental, collateral or subsequent proceedings between the parties can be taken into consideration for evidentiary value and if admission is made it can be read against him and in law it operates as estoppel against the party which has made the statement. Besides above, the learned counsel for the petitioner has relied upon the judgment of the Madras High Court delivered in case title *Bhagyalakshmi and another v. K. Narayana Rao, reported in* [2] The facts of this case are that out of the wedlock of the parties three children were born. They were living at Komarapalayam situated in District Salem. There were some minor quarrels and misunderstanding between the wife and the husband. The wife suggested the husband to go to her father's house situated at Village Kote for a brief stay. The husband agreed to her suggestion. She took the children also with her to her father's house. The husband made several efforts to get the wife and the children back to Komarapalayam but he was informed by the wife that she was suffering from ailment and undergoing treatment and refused to come back to her husband's house. When all attempts made by the husband were failed, he filed an application for custody of the children at District Court, Salem. The objection was taken that Court at Salem do not have the jurisdiction as the children are living with the mother at Village Kote which falls under the jurisdiction of another District. Dealing with this case, the Court observed as under:-

> "8. There is yet another point of view from which the question of jurisdiction may be considered. The objection with reference to the jurisdiction of the District Court at Salem to entertain the petition filed by the respondent was no doubt raised in the counter but it does not appear to have been seriously urged, as otherwise, that would have been dealt with by the Court below. But even otherwise, the appellants had participated in the proceedings and had also given evidence and on a consideration of the evidence that was placed before the Court and taking into account the welfare of the minors, the Court below had directed the appellants to hand over the custody of the minor children to the respondent. It cannot be said that there has been consequent failure of justice. Section 21, C. P. C. is intended to avoid technicalities based on local or territorial jurisdiction in the upholding of orders of Court. In *Shan Harichand Ratanchand v. Virbbal,* [3] it has been laid down that Section 21, C. P. C. is a transcendental and curative provision to see that technicalities do not prevail, when there is no failure of justice and that the appellate Court was bound to resort to this curative provision before declaring the order of the District Court to be null and void by upholding the objection about territorial jurisdiction.

Even on this ground, the contention of the appellants that the District Court at Salem had no jurisdiction to entertain the application filed by the respondent has to fail."

17. He has also relied upon the judgment delivered in case title *Konduparthi Venkateswarlu and others v. Ramavarapu Viroja Nandan and others, reported in* [4] wherein also the custody of the child was demanded by the husband. The parties lived permanently at Berhampur. A child was born out of the wedlock and stayed at Phulbani with the parents. The mother fell ill and the husband-respondent took his wife and the child to his father-in-law's house at Visakhapatnam and left them for treatment. The mother of the child passed away while the child was retained by the maternal grandparents. The father of the child approached them for handing over the child which was refused. He filed an application under Section 9 of the Guardians and Wards Act before the District Judge, Ganjam. The respondents therein took an objection with regard to the jurisdiction of the Court stating that the child is living at Visakhapatnam, therefore, the District Judge, Visakhapatnam is having the territorial jurisdiction to entertain the application. The Court while dealing with it observed as under :-

"5. Mr. Swamy in support of his contention relied upon a decision of the Rajasthan High Court in the case of *Smt. Vimla Devi v. Smt. Maya Devi,* [5] and a decision of the Andhra Pradesh High Court in the case of *Harihar Pershad Jaiswal v. Suresh Jaiswal,* [6] whereas Mr. Ratho, the learned counsel for the respondent No. 1 places reliance on the decisions in the cases of *Jamuna Prasad v. Mst. Panna,* [7] *Bhola Nath v. Sharda Devi,* [8] and *Sarada Nayar v. Vayankara Amma,* [9] The learned counsel for the parties stated that there is no decision of this Court nor is there any decision of the Supreme Court on the point. The place where the minor ordinarily resides so as to confer jurisdiction on the concerned District Judge, has to be interpreted in each case depending upon the facts and circumstances of that case. Residence of a minor is a matter of fact. By use of the expression "ordinarily resides" the Legislature obviously meant that it is more than a temporary residence even though such period may be considerable. A temporary residence at a particular place or residence by compulsion at a place, however long, cannot be treated as the place of ordinary residence. Similarly, the words "ordinarily resides" are not identical and cannot have the same meaning as "residence at the time of the application". The purpose for using the expression "where the minor ordinarily resides" is probably to avoid the mischief that a minor may be stealthily removed to a

distant place and even if he is forcibly kept there, the application for the 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. The learned Judge of the Rajasthan High Court in the case of *Smt. Vimla Devi v. Maya Devi,* [10] after considering the decisions of the Allahabad, Assam, Gujarat and Punjab High Courts came to the conclusion that since the minor had left her father's place along with her mother since she was only one month old and continued to remain with her mother at Bandikui, it cannot be said that the District Court at Bhilwara where her father was living can have the jurisdiction to entertain an application under the provisions of the Guardians and Wards Act. In other words, it was held that the minor cannot be considered to have ordinarily resided at Bhilwara within the meaning of Section 9 of the Act on the date of the presentation of the application. While taking the aforesaid view, the learned Judge also considered the contrary view expressed in *(Jhala Harpalsinh Natwar Sinhji v. Bai Aruna-kunvar)*; [11] *(Chandra Kishore v. Smt. Hemalata Gupta*) [12] and *(Sarada Nayar v. Vayankara Amma*). [13] The learned single Judge of the Andhra Pradesh High Court in the case of *Harihar Pershad Jaiswal v. Suresh Jaiswal,* [14] also considered the expression "place of ordinarily residence" used in Section 9 of the Act. It was held by the learned Judge that (at p. 18 of AIR) :-

"..... It is not the place of residence of the natural guardian that gives the jurisdiction to the Court under Section 9(1) but it is the place of ordinary residence of the minor and the Legislature has designedly used the word "where the minor ordinarily resides."

In the facts and circumstances of that case it was held that the minor's ordinary place of residence could not be at Hyderabad merely because the father who is the natural guardian was residing at Hyderabad. The aforesaid two decisions no doubt support the contention of Mr. Swamy, the learned counsel for the appellants to a great extent.

6. A Bench of Patna High Court in the case of *Bhola Nath v. Sharda Devi,* [15], considered Section 9(1) of the Act. Their Lordships held (Para 6) :-

"The question as to ordinary residence of the minor must be decided on the facts of each particular case and generally, the length of residence at a particular place determines the question. The expression "the place where the minor ordinarily resides" means the place where the minor generally resides and would be expected to reside but for special circumstances.

..... Generally in the case cited at the Bar, the dispute is between the

father and the mother with regard to the custody of the child and in that context, Section 9(1) of the Act has been interpreted depending upon the facts and circumstances of the case. There cannot be any doubt that the father is the legal guardian of a minor child, both under the Hindu law as well as under the Guardians and Wards Act. In all matters under the Guardians and Wards Act, paramount consideration is the interest of the minor. It is the welfare and interest of the minor which should weigh with the Court in interpreting a particular provision under the Guardians and Wards Act. Normally the minor child would have continued with his father and mother and his permanent residence at Berhampur. It is only by coincidence that the mother fell ill and the father took his wife and son to Visakhapatnam and left them there in his father-in-law's place and on account of sudden death of the mother the minor child remained at Visakhapatnam. In the aforesaid circumstances, I am unable to hold that Visakahpatnam would be considered as the place where the minor ordinarily resides. On the other hand, the minor's place of residence has been temporarily shifted to Visakhapatnam though for quite some time because of the eventuality that his mother fell seriously ill and had to be shifted to Visakhapatnam. Since the permanent residence of the father and also of the minor child is at *Berhampur* and they had in the fact remained in Orissa and it is only his father who had taken him along with his mother to Visakhapatnam for the treatment of his mother, the ordinary place of residence of the minor must be held to be at *Berhampur* and, therefore, the District Judge, Ganjam was right in his conclusion that he has jurisdiction under Section 9 of the Act to entertain the application for the custody of the child. I do not find any infirmity in the said order so as to be interfered with by this Court. Even the decision of the Rajasthan High Court on which the learned counsel for the appellants placed strong reliance also lays down that the "place of ordinary residence" has to be decided in that facts and circumstances of each case."

18. Learned counsel for the petitioner also relied upon the judgment of the Delhi High Court in *Amrit Pal Singh v. Jasmit Kaur, reported in* [16] whereby the custody of the children was demanded under Sections 6 and 25 of the Guardians and Wards Act, 1890. The father of the children took away the children from the mother. She filed an application for interim custody of the children till pendency of the main petition. The children were taken during the proceedings by the father to Guwahati by train. They permanently lived at *Rajouri Garden,* Delhi. In the application filed by the mother, objection was taken by the father that the Court at Delhi has no jurisdiction as the

children were living with the father at Guwahati. However, during the proceedings he did not press it and admitted the jurisdiction of Delhi High Court. Even in such circumstances the Court dealt with the question of jurisdiction and observed as under:-

> "10. Inherent jurisdiction is something different from territorial jurisdiction. The Guardianship Court in Delhi cannot be said to lack inherent jurisdiction as it is a Court that has power to decide guardianship matters. It cannot be said that the Court at Delhi was incompetent to try the suit of that kind. The objection at the highest can be to its territorial jurisdiction. This does not go to the competence of the Court and can also be waived. It is for the reason that law demands that the objection to territorial jurisdiction of a Court must be raised at the first instance. It is well settled that the objections as to the local jurisdiction of the Court does not stand on the same footing as to the competence of a Court to try a case. Competence of a Court to try a case goes to the very root of the jurisdiction and where it is lacking, it is a case of inherent lack of jurisdiction.
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> 11. On the other hand, an objection as to the local jurisdiction of a Court can be waived and this principle has been given a statutory recognition by an enactment under Section 21 of the Civil Procedure Code.
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> 12. In the present case, as already noted the children of the family were taken out of the matrimonial home on 17-9-2003 which to my mind was an act of inter-parental kidnapping and cannot deprive Delhi Courts of the territorial jurisdiction to entertain a petition."

19. On appreciation of provisions of law and the facts of this case it is seen that the child is under the custody of the maternal grand-mother because of the compelling circumstances. However, for the welfare of the child the custody of the child can be taken by the person who is interested in the welfare of the child. The maternal grand-mother in whose custody the child has been kept is taking care of the child and also filed an application demanding maintenance from the father for the welfare of the child. The respondent No. 3 Smt. Hussain Bano has stated in the Vakalatnamas (power of attorneys) and in her application under Section 125, Cr. P. C. that she permanently lives at Sikar and presently at Bombay. The living for certain period at certain place cannot be construed to be the ordinary residence of the minor. The Andhra Pradesh High Court in the case title *Harihar Pershad Jaiswal v. Suresh Jaiswal and others, reported in* [17] has dealt with the expression "place of ordinary residence" and observed as under :-

> "If the expression "place of ordinary residence" means the residence of his

natural guardian, the very purpose of using the word "the residence of the minor" in Section 9 would be the natural guardian that given the jurisdiction to the Court under Section 9(1) but it is the place of ordinary residence of the minor and the Legislative has designedly used the word "Where the minor ordinarily resides". Hence the actual residence of the minor, having regard to the circumstances under which the minor happens to reside at a particular place must be taken into consideration in deciding the place where the minor ordinarily resides.

In the circumstances of the case it must be held that the minor has been living with her mother at Nagpur for some time and at Tumsar in Maharashtra State for some time. Hence the minor's ordinary place of residence cannot be said to be Hyderabad merely because the father who is the natural gaurdian is residing at Hyderabad. (Case law discussed).

Further, there is no evidence to show that the minor was residing at Hyderabad in 1975 when the application was filed. Assuming it to be so, it can only be said to be a place of temporary residence for the purpose of complying with some conditions imposed by the Magistrate and this temporary residence cannot be deemed as the place of ordinary residence of the minor. In these circumstances, the trial Court was justified in holding that the Court at Hyderabad has no jurisdiction to try the petition and return the same for presentation to the proper Court."

20. The ordinary residence of the minor cannot be said to be at Sikar as the child has been shifted as per compulsion and the circumstances created by the mother of the child. The child would have been handed over to the custody of the father, though perhaps, the mother might have thought in her wisdom that the child with her mother may be more convenient and looked after well unmindful of it that the father is the natural guardian of the child. The plea of the learned counsel for the respondents that the ordinary residence is at Bombay is not made out as per their own pleadings and the record. Smt. Hussain Bano in whose custody the child is, is resident of Sikar. Since the child has been put under custody of the maternal grand-mother because of the compelling circumstances, therefore, it also cannot be said to be the ordinary residence of the minor. Therefore, under such circumstances, I feel that the District Court, Jhunjhunu from where the child was taken by the mother from the custody of the natural guardian has the jurisdiction to entertain the application as the Jhunjhunu is the ordinary residence of the child.

21. For the aforesaid reasons, the order under revision is set aside. The application is

remanded back to the District and Sessions Judge, Jhunjhunu for disposal in accordance of law.

22. Revision Petition is allowed. No order as to costs.

Revision allowed.

Cases Referred.

1. AIR 1999 SC 1741
2. AIR 1983 Madras 9
3. AIR 1975 Guj 150
4. AIR 1989 Orissa 151
5. AIR 1981 Raj211
6. AIR 1978 AP 13
7. AIR 1960 All 285
8. AIR 1954 Pat 489
9. AIR 1957 Ker158
10. AIR 1981 Raj 21
11. AIR 1954 Sau 13
12. AIR 1955 All 611
13. AIR 1957 Ker 158
14. AIR 1978 AP 13
15. AIR 1954 Pat 489
16. AIR 2006 Delhi 213
17. AIR 1978 AP 13