

RAJASTHAN HIGH COURT

Sanjay Agarwal

Vs.

Krishna Agarwal

C. Rev. P. No.48 of 2008

(Dinesh Maheshwari, J.)

26.05.2008

ORDER

Dinesh Maheshwari, J.

1. This revision petition is directed against the order dated 11-2-2008 as passed by the District Judge, Merta in the proceedings under the Guardians and Wards Act, 1890 ('the Act of 1890') rejecting an application moved by the petitioner-father under Order 7, Rule 11 of the Civil Procedure Code and rejecting his contention that the Court at Merta has no jurisdiction to deal with the matter because the minor son of the parties, custody of whose person is in question, is living with his father at Jodhpur.

2. A brief reference to the background facts would suffice. The non-petitioner (hereinafter also referred to as 'the mother') has filed the aforesaid petition under Section 10 of the Act of 1890 stating the facts about her marriage with the petitioner (hereinafter also referred to as 'the father') on 3-6-2001 and out of this wedlock, the child master Durgesh having born on 28-9-2004. While stating various facts and incidents when she was compelled to leave or was forcibly removed from the matrimonial house and was harassed by the petitioner and his family, the mother has ultimately referred to the incidents of 17-6-2006 and 18-6-2006 when, according to her, the child Master Durgesh was removed from her custody and under the compelling circumstances she was taken by her father to Merta. Narration of such facts and aspects is not necessary for the purpose of the present petition involving only the question of jurisdiction; however relevant aspects of the matter are that at the time of filing of the aforesaid petition, the child was about 1- years of age and the mother, residing at Merta, submitted in her application that Master Durgesh was in Jodhpur since 18-8-2006. While stating that the child was of tender age, was not even capable

of speaking properly and could be harmed by the father and his parents, the mother prayed for guardianship of the person of minor Durgesh.

3. The father (present petitioner) has filed a reply, inter alia, with the submissions that the mother was not living with him for his having contacted incurable disease and being required to remain under rest as per the medical advice. It has been averred that the minor Master Durgesh was living with his grandfather and father quite comfortably and it is in his welfare to live with them only. It has also been alleged that the mother and her parents are not in a position to take care of the child.

4. The petitioner-father also submitted an application under Order 7, Rule 11 of the Civil Procedure Code in the aforesaid proceedings under the Act of 1890 with the submissions that the petition was not maintainable in the Court at Merta for want of jurisdiction particularly when the child Master Durgesh is ordinarily residing with his natural father at Jodhpur. The mother put the application to contest with the submissions that in the case of the child of tender age, the expression 'ordinary residence' refers to the residence of the mother of the minor because she is the legal guardian for the child below 5 years of the age.

5. After hearing the parties, the learned District Judge, Merta by the impugned order dated 11-2-2008 has proceeded to reject the application moved by the petitioner-father with the observations that the mother is living at Merta City and has stated the age of her son below 5 years. The learned Judge with reference to the cited decisions, has observed that the wife was required to be saved from the burden of litigation and for the child below 5 years of age, it would be presumed that he lives with the mother and the petition would be maintainable by the mother in the Court related with her residence. The considerations and conclusions of the learned District Judge read as under :

(Vernacular matter omitted.....Ed.)

6. Assailing the order aforesaid, learned counsel for the petitioner-father has strenuously contended that as per the requirements of Section 9 of the Act of 1890, such guardianship proceedings could only be taken up before the District Court having jurisdiction to the place where the minor is residing at and in the present case, for the minor admittedly residing at Jodhpur, the Court at Merta has no jurisdiction to deal with the guardianship matter. According to learned counsel for the petitioner, there is no warrant for the proposition that for a child below 5 years of age the place of residence of mother shall determine jurisdiction for guardianship proceedings.

Learned counsel has referred to and relied upon the decisions in the cases of *Pooja Bahadur v. Uday Bahadur*,¹ *Vageesh Chandra Sharma v. Rajeev Joshi*,² and *Himanshu Mahajan v. Rashu Mahajan*,³

7. Learned counsel for the non-petitioner-mother has made a preliminary submission that as the matter relating to guardianship is covered under the Family Courts Act, 1984 ('the Act of 1984'), this revision petition under Section 115 of the Civil Procedure Code is not competent because the order passed by the Family Court could only be challenged in appeal under Section 19 of the Act of 1984. Learned counsel submitted on the merits that as per Section 6 of the Hindu Minority and Guardianship Act, 1956 ('the Act of 1956'), the custody of a minor who has not completed 5 years of age, is ordinarily to be with the mother and, therefore, it is the place of residence of mother that determines jurisdiction in relation to the claim for custody of a minor of tender age. Learned counsel has referred to and relied upon the decisions in the cases of *Smt. Manju Tiwari v. Dr. Rajendra Tiwari*,⁴ *Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu*,⁵ *Pooja Sharma alias Bhawana Sharma v. Satish Kumar*,⁶ *K. C. Sashidhar v. Smt. Roopa*,⁷ and *Sarbjit v. Piara Lal*,⁸

8. Submissions of the learned counsel for the parties have been given thoughtful consideration with reference to the record of the cases and the law applicable.

9. The preliminary objection regarding maintainability of this revision petition with reference to the provisions of the Family Courts Act, 1984 has only been noted to be rejected as rather misconceived. Admittedly, the proceedings in question have been taken up with the District Court at Merta and the said Court is not a Family Court within the meaning of the Act of 1984 whereby and where under a Family Court is established as per Section 3 and exercises jurisdiction as per Section 7. Under Section 19 of the Act of 1984, an appeal lies from every judgment or order, not being an interlocutory order, of a Family Court to the High Court. The order impugned has not been passed by a Family Court established under the Act of 1984 and the same is not open to appeal under Section 19 of the said Act. The objection as raised on behalf of the non-petitioner stands rejected.

10. To deal with the contentious issue relating to jurisdiction as involved in the present case, the relevant provisions of Section 9 of the Act of 1890 and Section 6 of the Act of 1956 could be noticed at the first. Section 9 of the Act of 1890 reads as under:

"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 the 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 the 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."

11. Section 6 of the Act of 1956 reads as under:

"6. Natural Guardians of a Hindu Minor.- The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are -

(a) in the case of a boy or an unmarried girl - the father, and after him, the mother : provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl - the mother, and after her, the father;

(c) in the case of a married girl - the husband.

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section -

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation :- In this section, the expression "father" and "mother" do not include a step-father and a step-mother."

12. The learned District Judge, Merta while stating the conclusions as reproduced above, has not referred to the relevant of the provisions dealings with the question of jurisdiction but it is apparent that it is the declaration in clause (a) of Section 6 of the Act of 1956 about the ordinary desirability of custody of a minor who has not completed 5 years of age to be with the mother that has been imported to hold that for such a child below 5 years in age, the application is maintainable before the Court in whose territorial jurisdiction the mother is residing at. The considerations as adopted by the learned District Judge have been supported by the learned counsel for the non-

petitioner-mother with the same argument that for a child of tender age, the custody has to be with the mother and hence the Court having jurisdiction over the place of residence of mother shall have jurisdiction to deal with the guardianship proceedings relating to such minor. To appreciate the submissions, it shall be apposite at this juncture to refer to the decisions cited by the learned counsel for the non-petitioner.

13. In the case of Manju Tiwari (AIR 1990 Supreme Court 1156) (supra) custody of child was ordered to be given to the mother in a criminal writ petition by the Hon'ble Supreme Court as the child was found below 5 years of age and yet it was left open for the father to apply for custody of child in appropriate guardianship proceedings. The said case has no bearing on the question of jurisdiction as involved in the present case.

14. The decision in Smt. Surinder Kaur Sandhu's case (AIR 1984 Supreme Court 1224) (supra) by the Hon'ble Supreme Court deals with an entirely different scenario where the parties were married in India but shifted to England where a son was born to them in the year 1975. Then, in England, the husband-respondent was convicted for offence of negotiating with a hit man for getting his wife killed but then was on probation order that expired in the month of December 1982; however, in the month of January 1983, the husband removed the boy from the house when the wife was out on the job and brought him to India. The wife obtained an order under Section 41 of the Supreme Court Act of 1991 wherein the boy became ward of the Court with effect from that date and then came to India and filed a petition under Section 97 of the Criminal Procedure Code but the learned Magistrate dismissed the petition leaving the question of custody of child to be decided in an appropriate proceeding. The wife went back to England and obtained the order from the High Court of Justice whereby the husband was directed to hand over the custody of the minor boy to the wife. The wife came back to India and then filed writ petition in the High Court of Punjab and Haryana asking for production and custody of her minor son. The learned single Judge of the High Court dismissed the wife's petition looking to her status in England being that of a foreigner, a factory worker, living separate from husband, and for her having no relatives in England. The learned Judge formed the opinion that the child would have to live in lonely and dismal surroundings with the mother whereas he would grow with his father in a atmosphere of self-confidence and self-respect.

15. The Hon'ble Supreme Court did not agree with it would be less for the welfare of the minor if he would live with his mother and opined that in his 8 years of age the loving care of mother ought not be denied to him. The character of the father was also commented at who offered solicitation to the commission of his wife's murder and

abused even the magnitude shown by the wife when she obtained the order for probation for him and whisked away the boy.

16. On the question of law, the Hon'ble Supreme Court found that the boy was a British citizen holding a British passport and the English Court has jurisdiction to decide the question of his custody. In that context, the Hon'ble Supreme Court made observations that in the matters relating to matrimony and custody, the law of that place must govern which has the closest concern with well-being of the spouses and welfare of the off-springs; and looking to the fact situation of the said case, the Hon'ble Court found it reasonable and just for the Court of that State where the matrimonial home had been to assume jurisdiction to enforce obligations incurred therein by the spouses. In such background and context, the Hon'ble Supreme Court made the observations that,-

"10.....It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy."

17. It is very difficult to appreciate the submissions as made by the learned counsel for the non-petitioner-mother and so also the observations as made by the learned District Judge in an abstract reference to the aforesaid observations of the Hon'ble Supreme Court that the wife was required to be saved from the burden of litigation. The submission as made on behalf of the non-petitioner-mother and the observations as made by the learned District Judge, with respect, are of reading only a part of observations of the Hon'ble Apex Court in Surinder Kaur Sadhu's case (AIR 1984 Supreme Court 1224) (supra) totally away and detached from the context. The said decision has, obviously, no application to the question at hands regarding jurisdiction.

18. So far the decision of the Hon'ble Punjab and Haryana High Court in Pooja Sharma's case (supra) is concerned, therein the respondent Satish Kumar had filed the petition under Section 7 read with Section 10 of the Act of 1890 at Jagadhri and it was pleaded in the petition itself that the minor was residing with his mother in her parental house within the jurisdiction of Tehsil Dera Bassi, District *Rajpura*. The Hon'ble High Court found that on the admitted fact of the minor staying with mother at Dera Bassi falling within the jurisdiction of the Courts at *Rajpura*, the petition for appointment of guardian could be maintained only before the Courts at *Rajpura*. The said decision on principles would rather operate against the plea taken on behalf of the non-petitioner where the jurisdiction has been considered with reference to the place

of stay of the minor.

19. The Hon'ble Karnataka High Court in the case of K. C. Sashidhar (AIR 1993 Karnataka 120) (supra) has, of course, taken the view that in the case of child of tender age, the legal guardian would be the mother and the place of her residence would be construed as "ordinary residence" of the minor; and the finding given by the subordinate Court treating the petition filed at the place of residence of the mother to be well within jurisdiction was found not suffering from any legal infirmities. The Hon'ble Karnataka High Court in K. C. Sashidhar's case (AIR 1993 Karnataka 120) (supra) said :

5. In the instant case, since the child is of tender age, the legal guardian would be the mother and the place of her residence, on the date of the presentation of the petition, is the place where it is to be construed as the minor "ordinarily resided" and as such the finding arrived at by the Court below does not suffer from any legal infirmities."

20. The aforesaid proposition as stated in K. C. Sashidhar's case by the Hon'ble Karnataka High Court has been followed by the Hon'ble Punjab and Haryana High Court in Sarbjit's case (AIR 2005 Punjab and Haryana 237) (supra) wherein the Court said :-

11. The question then arises whether the expression 'minor ordinarily resides' used in Section 9 could be construed to mean that the minor would cease to reside with his mother. Once under Section 6(1), it is mandatory that a child below the age of 5 years has to reside ordinarily with the mother then the expression 'where the 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. This proposition is supported by the view taken by the Karnataka High Court in the case of K. C. Sashidhar (AIR 1993 Karnataka 120) (supra)."

21. It may be pointed that in the said decision in Sarbjit's case (AIR 2005 Punjab and Haryana 237) (supra), in paragraph 13, reference has been made to the observation of the Hon'ble Supreme Court in Surinder Kaur Sandhu's case (AIR 1984 Supreme Court 1224) while observing that it is the duty of the Court to protect the wife against burden of litigation in an inconvenient forum. However, with respect, it may again be pointed out that the referred observations were not made by the Hon'ble Supreme Court in relation to the interpretation of Section 9 of the Act of 1890.

22. Taking now the decisions cited by the learned counsel for the petitioner, it is noticed that the Hon'ble Himachal Pradesh High Court in Himanshu Mahajan's case (AIR 2008 Himachal Pradesh 38) (supra) while disagreeing with the decisions as rendered in the cases of K. C. Sashidhar (AIR 1993 Karnataka 120) and Sarbjit (AIR 2005 Punjab and Haryana 237) (supra), pointed out that Section 6 of the Act of 1956 stipulates the ordinary desirability of the custody of minor child below the age of 5 years to be with the mother for obvious reasons yet in a given case she might be under disability whereas father might not be; and, therefore, observed that Clause (a) of Section 6 of the Act of 1956 cannot be held to be of mandatory or binding nature. The Hon'ble Himachal Pradesh High Court has been of view that the issue of natural guardianship of child being the subject-matter of Section 6 of the Act of 1956 cannot be linked with or imported into Section 9 of the Act of 1890; and held that for the purpose of Section 9 of the Act of 1890, the unambiguous expression of 'ordinary residence' refers to the child himself, i.e. the actual and physical place of residence and not a legal and constructive residence. The Hon'ble Court said:

"16. Section 6(a) of 1956 Act and Section 9 of 1890 Act operate in different fields. Both are independent of each other. Whereas Section 6 of 1956 Act deals with the issue of the natural guardianships of a Hindu minor, and Clauses (a), (b) and (c) define the natural guardians, Section 9 of 1890 Act lays down the rule with respect to the territorial jurisdiction of the Court where the application for the custody of a child has to be filed. This Section clearly relates to and refers the "ordinary residence" of the child and says that only such Court shall have the jurisdiction to entertain the petition where the child "ordinarily resides". The issue of the natural guardianship of the child being the subject-matter of Section 6 of 1956 Act cannot be thrust upon, linked with or imported into Section 9 of the 1890 Act. If the Legislature intended that the residence of the mother or the father of the child should determine the ordinary residence of the child himself, it should have used the expression to that effect in Section 9 of 1890 Act, it did not do so. It used and specified the expression "ordinary residence" of the child himself. The expression is unambiguous and totally certain as well as clear. Taking a cue from the observations made by their Lordships of the Supreme Court in the case of Smt. Jeewanti Pandey, AIR 1982 Supreme Court 3 (supra), it can safely be said that the expression "ordinary residence" must mean the actual, physical place and not a legal or constructive residence."

23. In the case of Vageesh Chandra Sharma (supra), the mother of the minor children

(a boy and a girl) had committed suicide and a criminal case was registered against their father. The boy, Master Vaibhav, was living with his father and the girl, Kumari Ritvi, was living with her maternal grandfather. The maternal grandfather sought legal custody of both the children by filing a petition in the Family Court at *Jaipur*. The respondent submitted reply claiming custody of Kumari Ritvi. The Family Court though found the applicant, maternal grandfather, to be the best entitled person for claiming custody of both the children, returned the petition on the ground of jurisdiction. Both the contesting parties were in appeal before this Court. So far the question of jurisdiction is concerned, the Hon'ble Division Bench of this Court observed and held :-

"10. In the facts and circumstances of the present case, appellant Vageesh Chandra Sharma claimed the custody of Kumari Ritvi, who at the time of filing of the petition was residing at *Jaipur* and in our opinion, she was ordinarily residing in the jurisdiction of the Family Court. Thus, in view of sub-section (1) of Section 9 of the Guardians and Wards Act, 1890 the Family Court has committed illegality in deciding the issue of jurisdiction and we set-aside the said finding and hold that the Family Court, Jaipur had jurisdiction to entertain the petition."

24. In the case of Pooja Bahadur (AIR 1999 Supreme Court 1741) (supra), it appears that the minor children of the estranged parents were living with the father at Delhi and the mother took up the custody proceeding at Chandigarh. The Hon'ble Punjab and Haryana High Court took the view that such proceedings would lie before the competent Court at Delhi and not at Chandigarh. Thus, the question of jurisdiction was decided on the basis of actual residence of the minors, and the Hon'ble Supreme Court approved the said decision thus:

"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."

25. It may further be noted that in the aforesaid case of Pooja Bahadur, the Hon'ble Supreme Court directed transfer of custody proceedings from Chandigarh Court to the concerned Court at Delhi for decision on merits.

26. In view of the approval by the Hon'ble Supreme Court in Pooja Bahadur (AIR 1999 Supreme Court 1741) of the view that custody proceedings by the mother would

lie at the place where the minors were residing with the father, and for the observations of the Division Bench of this Court in Vageesh Chandra Sharma again indicating that the petition for custody of child would lie at the place where the child was actually residing, it is clear that it is the actual place of residence of the minor which Section 9 of the Act of 1890 is concerned with.

27. True it is that in the said decisions in Pooja Bahadur and Vageesh Chandra Sharma, the age of the respective minors are not available but then, this Court finds no reason to take a view that for the purpose of a minor above 5 years of age it would be his actual residence that would determine territorial jurisdiction for the purpose of the Act of 1890 and in case of the minor below 5 years of age, the residence of the mother would determine such jurisdiction.

28. The view taken by the Hon'ble Himachal Pradesh High Court in Himanshu Mahajan's case (AIR 2009 Himachal Pradesh 38) that Section 6(a) of the Act of 1956 and Section 9 of 1890 operate in different fields and the issue of natural guardianship of a Hindu minor as provided in Section 6 of the Act of 1956 cannot be imported into the Section 9 of the Act of 1890 for the purpose of territorial jurisdiction to deal with guardianship proceedings appears to be in accord with the scheme and operation of the relevant statutory provisions.

29. It may further be pointed out that the Act of 1956 essentially having been enacted to amend and codify certain parts of law relating to the minority and guardianship among Hindus, does not apply to several other class of persons as specified in its Section 3. Moreover, the Act of 1956 is only in addition to, and not in derogation of, the Act of 1890, save as otherwise expressly provided.

30. So far jurisdiction to entertain the application for guardianship of a person is concerned, the Act of 1956 does not make any overriding provision in that regard and importing the declaration under Section 6 of the Act of 1956 for the purpose of Section 9 of the Act of 1890 would, in the opinion of this Court, be not in conformity with Section 2 of the Act of 1956 that expressly makes the Act of 1956 only supplemental to the Act of 1890.

31. Having examined the matter from all relevant angles, this Court, with respect, is unable to follow the decisions in K. C. Sashidhar (AIR 1993 Karnataka 120) and Sarbjit (AIR 2005 Punjab and Haryana 237) (supra); and, with respect, agrees with the view as expressed in Himanshu Mahajan's case (AIR 2008 Himachal Pradesh 38) (supra) by the Hon'ble Himachal Pradesh High Court.

32. As a necessary result of the aforesaid, the petition as filed under Section 10 of the Act of 1890 by the non-petitioner-mother is not of the jurisdiction of the Court of District Judge at Merta when the minor is admittedly residing with his father at Jodhpur. The impugned order dated 11-2-2008 cannot be sustained and is, therefore, set aside.

33. However, even when the impugned order is set aside, the prayer as made in the application under Order 7, Rule 11, Civil Procedure Code cannot be granted and the plaint is not required to be rejected. On the admitted fact situation, the Family Court at Jodhpur shall have jurisdiction to deal with the matter. Though in the ordinary circumstances, this Court would have ordered return of the plaint for presentation to the proper Court but then, the matter relates to the custody of person of minor, said to be now about 3- years of age and it is pointed out that the petitioner has already filed his written statement. In the totality of the facts and circumstances of this case, it appears appropriate that exercising the powers under Section 24 of the Civil Procedure Code, the petition (Civil Misc. Case No. 55/2006) be withdrawn from the Court of District Judge, Merta and be transferred to the Family Court at Jodhpur for expeditious disposal in accordance with law.

34. At the time of entertaining this revision petition, the petitioner was directed to deposit an amount of Rs. 7,000/- towards litigation expenses of the non-petitioner. Irrespective of the result of this revision petition, such amount deserves to be paid to the non-petitioner towards litigation expenses relating to this revision petition.

35. As a result of the aforesaid:

(a) this revision petition is allowed, the impugned order dated 11-2-2008 is set aside and the Court of District Judge, Merta is held having no jurisdiction to deal with the petition filed by the non-petitioner-mother under Section 10 of the Act of 1890;

(b) The said petition in the Court of District Judge Merta (Civil Misc. Case No. 55/ 2006) stands withdrawn from that Court and is transferred to the Family Court at Jodhpur for expeditious trial and disposal in accordance with law;

(c) The parties shall appear before the Family Court, Jodhpur with minor Master Durgesh whose custody is in question on 31-5-2008 and shall stand noticed through their lawyers appearing before this Court.

(d) The amount of Rs. 7,000/- as deposited by the petitioner be paid to the non-petitioner towards litigation expenses of this revision petition.

Revision allowed.

Cases Referred.

1. AIR 1999 SC 1741
2. 2001 (3) RLR 480
3. AIR 2008 HP 38
4. AIR 1990 SC 1156
5. (1984) 3 SCC 698: (AIR 1984 SC 1224)
6. 2006 (2) Civil Court Cases 648 (Pand H)
7. AIR 1993 Karn 120
8. 2005 (3) Civil Court Cases 179: (AIR 2005 Punjab and Haryana 237)