

Before M.M.S. Bedi & Gurvinder Singh Gill, JJ.

AARTI—Appellant

versus

JAGDISH—Respondent

FAO No.4220 of 2016

January 24, 2018

Guardian and Wards Act, 1890—Ss.4(5) and 9—Removing children from ordinary place of residence before filing petition—Jurisdiction of guardian Judge would not be ousted.

Held that perusal of above order dated 26.02.2016 indicates that on the basis of the information supplied to the Court that the children had been shifted to District Alwar, Rajasthan, the ordinary place of residence of the children would be Alwar, Rajasthan, as such, the Court at Gurgaon did not have the jurisdiction. The trial Court failed to appreciate the fact that even if the averment of the respondent-husband is admitted to be correct i.e. children having been shifted to Alwar, Rajasthan on 2.2.2015, it could not be ignored that the petition for custody of the children had been filed on 16.5.2015. Merely taking away of the minor children from their ordinary place of residence three months prior to the filing of the petition by opposite party, will not debar the jurisdiction of the Guardian Judge to adjudicate the claim of a party.

(Para 5)

None for the appellant.

Sunita Nambiar, Advocate, for
Abhimanyu Singh, Advocate,
for the respondent.

M. M. S. BEDI, J.

(1) Appellant-wife had filed a petition under Sections 7 and 27 of the Guardian and Wards Act, 1890 read with Section 6 of the Hindu Minority and Guardianship Act at Gurgaon for custody of her two minor children namely Master Jeet and Master Aayush alleging that both the minors had been in custody of the petitioner-husband since birth and were residing in Gurgaon.

(2) She claimed that she was beaten by her husband in March 2011 by her husband. She remained hospitalized for some time. Again in the month of October 2013 the appellant was beaten by her husband and without any reason similar occurrence took place on July 2014 on account of demand of dowry of the respondent having not been fulfilled. After she was beaten up on 2.2.2015 by her husband and family members the appellant came back to her parental home and has been residing in her parent's house in Gurgaon.

(3) The respondent-husband had taken up a plea in the reply admitting that he had been staying in Gurgaon being an employee of Ravi Security Services but on account of appellant having abandoned two minor children in biting cold on 2.2.2015, he shifted his residence from Gurgaon to Village Khairthal, Alwar, Rajasthan.

(4) The Family Court, taking into consideration the said fact passed the following order on 26.2.2016 dismissing the application for appointing the appellant as guardian of the minors and for custody of the children:

“Both the parties have appeared today and respondent has produced his two minor children of the parties namely Jeet and Aayush. Undersigned has spoken to the children and both of them are unwilling to speak to the petitioner. Younger child even did not identify the petitioner. Elder child is able to identify the petitioner as his mother and refused to speak to her. He has stated that he does not want to talk about his mother at all and does not like her. It has been brought to the notice of this court that two children are currently living in Khairthal, Alwar, Rajasthan and both are studying in school there for the past more than a year. Since ordinary place of children is village Khairthal, Alwar, Rajasthan, this court has no jurisdiction to entertain this petition. Learned counsel for the petitioner has stated that he does not wish to withdraw this petition. Since this court has no jurisdiction to entertain this petition, same is hereby dismissed for want of jurisdiction. File be consigned to record room.”

(5) Perusal of above order dated 26.02.2016 indicates that on the basis of the information supplied to the Court that the children had been shifted to District Alwar, Rajasthan, the ordinary place of residence of the children would be Alwar, Rajasthan, as such, the Court at Gurgaon did not have the jurisdiction. The trial Court failed to

appreciate the fact that even if the averment of the respondent-husband is admitted to be correct i.e. children having been shifted to Alwar, Rajasthan on 2.2.2015, it could not be ignored that the petition for custody of the children had been filed on 16.5.2015. Merely taking away of the minor children from their ordinary place of residence three months prior to the filing of the petition by opposite party, will not debar the jurisdiction of the Guardian Judge to adjudicate the claim of a party.

(6) As per Section 4 of the Guardian and Wards Act, the definition of “Court” in Section 4(5) reads as follows:

“4. Definitions.- In this Act, unless there is something repugnant in the subject or context

xxx xxx xxx xxx

(5) "the Court" means—

- (a) the District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian; or
- (b) where a guardian has been appointed or declared in pursuance of any such application—
 - (i) the Court which, or the Court of the officer who, appointed or declared the guardian or is under this Act deemed to have appointed or declared the guardian, or
 - (ii) in any matter relating to the person of the ward the District Court having jurisdiction in the place where the ward for the time being ordinarily resides, or
- (c) in respect of any proceeding transferred under Section 4-A, the Court of the officer to whom such proceeding has been transferred;”

(7) As per definition of “Court” under Section 4(5) and Section 9, an application with respect to the guardianship of the person of the minor shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides. It is settled principle of law that when the children are removed from their ordinary place of residence, the Court of that area will not seize to have jurisdiction. The test for determining the jurisdiction is the place of ordinary residence of

the minor and intention to make that place one's ordinary abode. In this context, law has been laid down by Hon'ble Supreme Court in ***Ruchi Majoo*** versus ***Sanjeev Majoo***¹. In ***Konduparthi Venkateswarlu*** versus ***Ramavarapu Viroja Nanda***² it was observed that the purpose for using the expression "where the minor ordinary 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 and in other words the place where the minor would have continued, to remain before this removal.

(8) In the above circumstances, we are of the opinion that the learned District Judge, Family Court Gurgaon vide order dated 26.2.2016 has abruptly adopted an evasive approach to adjudicate the issue regarding residence by forcing the counsel for the appellant before it asking to withdraw the petition and arriving at a conclusion that the said Court does not have the jurisdiction. The Court should have considered the fact that the allegation of the respondent-husband was that few months prior to the date of filing of the petition, he had removed the children to Rajasthan, though, he had been staying and working in Gurgaon prior to that period. The Court below was required to adjudicate the issue regarding jurisdiction on the basis of the pleadings and give finding. The shortcut adopted by the trial Court is violative of Order 20 Rule 5 of CPC which requires the Court to give its decision on each of the issues arising in a particular case. The order dated 26.2.2016 is thus not sustainable and is liable to be set aside.

(9) The appeal is allowed. Impugned order is set aside and the original petition stands restored. The District Judge, Family Court, Gurgaon is directed to decide the petition on merits by framing issues on the pleas raised by both the parties in their pleadings by framing the issues in accordance with law.

(10) Nothing mentioned in this order will affect the rights of any of the parties on merits.

(11) Parties are directed to appear before the Family Court, Gurgaon on 17.3.2018 for further proceedings in accordance with law.

(12) Since the appellant is not present, a copy of the order be sent to the appellant as well as Mr. Vivek Aggarwal, Advocate who filed the

¹ 2011(6) SCC 479

² AIR 1989 Orissa 151

appeal. Since the respondent is represented by proxy counsel Ms. Sunita Nambiar, Advocate, respondent will be deemed to have notice regarding the next date of hearing before the Family Court, Gurgaon.

Sanjeev Sharma, Editor