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(2016) 01 OHC CK 0069

In the Orissa High Court

Case No : W.P. (C) No. 21446 of 2012

Anupama Sar — APPELLANT

Vs

Judge, Family Court, Bhubaneswar and another — RESPONDENT

Date of Decision : 06-01-2016

Acts Referred:
Constitution of India, 1950 — Article 226
Guardians and Wards Act, 1890 — Section 10, 7

Citation : (2016) 162 AIC 398

Hon'ble Judges : Biswanath Rath, J.

Bench : Single Bench

Advocate : S. Jena and G. B. Jena, Advocates, for the Appellant; S. K. Purohit, A K. Dad and A. K. Nayak, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Biswanath Rath, J.—This writ petition has been filed challenging therein the order dated 8.10.2012 passed by the Judge, Family Court, Bhubaneswar in C. P. No. 106 of 2010 thereby dropping the C. P. No. 106 of 2010 as not maintainable.

2. The short fact involved in the case is that the present petitioner, a wife, filed Guardian Misc. Case No. 208 of 2010 which was subsequently numbered as C. P. No. 106 of 2010, an application under section 7 read with section 10 of the Guardian and Wards, Act, 1890 for appointing guardian for minor children. The application was filed basing on assertion that the marriage between the petitioner and the opposite party No. 2 was solemnized as per Hindu custom and tradition and out of their wedlock, two male children took birth. In view of the dissention between the parties, both the parties got separated and the wife is residing separately. It was further pleaded that the minor children were in custody of the petitioner since their birth till the date of filing of the application. The petitioner herself is an employee in Navodaya Bidyalaya, getting a handsom salary and she is financially sound to maintain both her children with support of

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her parents. She is taking all care of the minor children. Her husband is a driver, had neither love affection towards the children nor he has ever shown fatherly affection, since the birth of the children, which is also material factor for not allowing the children under the guardianship of the opposite party in filing the application. The petitioner has shown the cause of action to be on he opposite party No. 2 filing the petition under section 97 of the Cr. P.O. on 7.9.2010 for wrongful confinement of the children. Upon receipt of the notice in the C. P. No. 106 of 2010, the opposite party-husband filed the written statement opposing the allegations made by the wife and while admitting their marriage, the opposite party-husband stated that they are blessed with twin sons and that the petitioner was a working lady before her marriage, even dissension in the family is for the reason of the wife. The husband disputed the custody of the minor children with the petitioner since their birth and claimed that both the minor sons were residing thereafter with the petitioner since their birth on 9.12.2001 but wife herself left the custody of both the children with him on the day of Mahalaya in 2007 leaving with the opposite party No. 2 in his native village. While the matter stood thus, the petitioner kidnapped both the sons on their way to school, namely, Glorious English Medium School, Jaipur on 21.8.2010 remained in their mother''s custody till their recovery vide an order of the Court dated 7.12.2011. The husband in filing the written statement contended that he is able to nurture both the sons giving them utmost love and affection as well as care and he is looking forward to a good future to both of them.

3. During pendency of the aforesaid application, the husband-opposite parly filed an application for rejection of C. P. No. 106 of 2010 on applying provision under section 9 (I) of the Guardian and Wards Act, 1890. Upon receipt of the copy of the application, the wife filed an objection indicating therein that the twin sons after attending their school going age were admitted at Saraswati Shishu Mandir, Bolgarh, Khurda in the year 2005 and prior to this period, both the sons were residing with the mother-petitioner. On 1.4.2006 she gave both of them admission in KG-I, Aurobindo Integral School, Rajasunakhala, Khurda in the district of Khurda and subsequently both the sons were admitted in KG-II at Capital Sovaniya Shikshashram, Chandrasekharpur, Bhubaneswar on 3.4.2007 and both of them have successfully completed their Standard-I examination. In the meantime, in the month of June, 2009, the opposite party No. 2 deceitfully and with fraudulent intention took both the children and confined both of them with him, for which both of them were unable to attend the school from June, 2009 to 22.8.2010. On 23.8.2010 both the sons were admitted at Saint Xaviers High School, Khurda in Standard-II and in the meantime they have successfully completed standard II course and subsequently both of them have been admitted at Seventh-Day Adventist Higher Secondary School, Khurda on 11.4.2011 in Standard III. While both the twins are studying as such, the opposite party took both of them to his custody by virtue of an order of a Court.

4. Upon hearing the parties, the learned Trial Court passed the impugned order holding that from the material available on record and the documents produced

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by the parties, there appear the place of ordinary residence of both the children were with the father-opposite party and, therefore, the institution of C. P. Could not have been made in Bhubaneswar and consequently the Trial Court dropped the civil proceeding on the plea of maintainability for want of territorial jurisdiction.

5. Challenging the impugned order, Mrs. Jena, learned Counsel appearing for the petitioner while reiterating her entire stand in the objection to the petition at the instance of the husband, challenged the raising of dispute on the maintainability of the proceeding at Bhubaneswar, she further contended that from the pleading in the original application as well as the objection, the ordinary place of residence of both the minor children were in the district of Khurda and as a consequence of which the C.P. case was rightly filed in the Judge Family Court, Bhubaneswar. The Family Court, Bhubaneswar failed in appreciating the material in favour of the petitioner and. therefore, arrived at the wrong and illegal order. Further, relying on a decision of this Court in the case of Konduparthi Venkateswarlu and others v. Ramavarapu Vivoja Nandan and others, AIR 1989 Ori 151, she contended that following the dictum of this Court, since the original place of residence of the minor children is in the district of Khurda, further since both of them spent their vital life time in the district of Khurda, therefore, urged that Family Court at Bhubaneswar has the jurisdiction and thus the impugned order runs contrary to the decision of this Court.

6. Per contra, R. Purohit, learned Counsel appearing for the opposite party No. 2, apart from reiterating his stand taken in the written statement, the petition filed questioning the maintainability of the proceeding at Bhubaneswar, took the Court through a written note of sub-mission and contended that in view of the materials available on record under no remote chance it can be construed that the original residence so far as the minor children are concerned is in the district of Khurda. But as the series of documents and the entire narration discloses the ordinary place of residence of both the children at Jajpur, and thus, the proceeding in the Judge, Family Court Bhubaneswar was not maintainable. Relying on the very decision cited by he petitioner, Mr. Purohit, learned Counsel appearing for the opposite party No. 2 contended that the Family Court did not mistake in holding the proceeding lack of jurisdiction and, therefore, claimed that there is no scope for interfering in the impugned order.

7. Heard learned Counsel for the parties and perused the pleadings of both the parties on the issue of ordinary residence of the minor children. In one hand, the wife claimed that both the minor children were all through residing with her except for the period in between 2009 to 2010 when the husband kidnapped both the children from her custody. In establishing her case, in the objection, the petitioner also disclosed the residing of her both sons in different schools at different point of time in between 2005 to 2011 except the period, the husband kidnapped both the minor children. Similarly, going through the petition questioning the maintainability of the proceeding on the point of jurisdiction and

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the written note of submissions of the opposite party, it reveals that the husband has also taken a similar plea that both the children were staying with him all through in the native village at Laxmi Nagar under Jajpur district. The husband-opposite party has a clear case that their marriage was solemnized on 9.12.2010. He nowhere denied the fact of birth of both the minors taking place on 9.12.2001. On the other hand, as clearly appearing in the written note of submission filed by opposite party No. 2, under para heading "Factual backdrop of the case" has categorically submitted that "the petitioner left the twin sons in the native village on the day of mahalaya in the year 2007". The husband further claimed that while both the son were prosecuting their education under the guardianship of the opposite party No. 2, the wife-petitioner kidnapped both the twin sons from the gate of Glorious English Medium School, Jaipur Road on 21.8.2010 and both the sons could be recovered by the order of the Court taking help of the police on 7.12.2011.

Under the above facts and narrations, the question that arose of consideration is what would be the ordinary place of residence of the minor children for institution of the proceeding under section 7 read with section 10 of the Guardian and Wards Act, 1890.

Provision of section 7 of the Guardians & Wards Act, 1890 deals with power of the Court to make order as to guardianship. Similarly, section 9 deals with the Court having jurisdiction to entertain application. The provision at section 9 of the Act, 1890 reads as herein 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 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.

8. Reading of section 9 of sub-section 1 of the Guardians and Wards Act, 1890 makes it clear that when the application is with respect of 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.

9. Deciding a case of this nature in the case between Konduparthi Venkateswarlu and others v. Ramavarapu Viroja Nandan and others, AIR 1989 Ori 151 (supra), dealing with section 9 of the Act, this Court relying on a decision of Patna High

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Court held in all matters under the Guardians and Ward Act, 1890, the paramount consideration is the interest of minor. It is the welfare and interest of minor which should weight with the Court interpreting a particular provision under the Guardians and Wards Act, 1890. Normally a minor child would have continued with his father and other and his permanent resident at Berhampur. It is only by co-incidence 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 children remained at Visakhapatnam. In the aforesaid circumstance, I am unable to hold that Visakhapatnam would be considered as the place where the minor ordinarily resides. On the other hands, 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 has to be shifted to Visakhapatnam. Since the permanent residence of father and also of minor children was at Berhampur and they had in the fact remain in Orissa. It is only his father who had taken him along with his mother to Visakhapatnam for treatment of his mother. The original place of residence of minor must be held to be Berhampur and therefore, the district of 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.

10. In deciding a case of this nature, the Guwahati High Court in the case Amal Saha v. Smt. Basna Saha, AIR 1988 Gau 22, has held therein that while deciding a case of this nature the Court has to bear in mind the following :

(I) facts on record are to be taken in to consideration.

(II) "Ordinary resident does not mean residence at the time of application" rather the minor''s recent removal from the place where he ordinarily resides would render nugatory the provisions of the section if cognizance of the case is taken.

(III) Place where the guardian resides cannot be presumed to be a place where minor is ordinary resident.

(IV) Where the minor is found to be residing with any one of his parent, it may raise question of constructive custody.

(V) A minor having no permanent aborde must deem to be ordinary resident at the place where he actually resides.

11. Now coming to the present case, the fact as narrated in the C. P. case as well as in the written statement, there appears a contradictory statement by both the parties in respect of the original residence of the minor children, when the wife claims that the minor children were all through with her even prosecuting their education at her end, except the period they were kidnapped by the husband, at the same time, husband also claims that the twin minor sons are in lawful custody of this opposite party No. 2 in his native village and they were all through prosecuting their education with him except for the period, the wife kidnapped both the children from the custody of the husband, There appears an

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affidavit verses an affidavit. Now coming to the application for challenging the maintainability of the proceeding, the husband in paragraph 2 disclosed that the minor twin sons have been ordinarily residing with the opposite party-father and they are reading in the Glorious English Medium School, Jajpur Road. Therefore, in filing an objection claimed that the proceeding in Kurda jurisdiction in not maintainable. The petitioner-wife, on the other hand, gave a history of the ordinary resident of both the minor children describing then in more than four paragraphs. Residing of the entire pleading, it clearly appears that on his own statement, the husband in the written note of submission admitted that marriage of the parties was solemnised on 9.12.2000. There is also no dispute that both the children got their birth as twin on 9.12.2001. Opposite party No. 2 himself admitted in paragraph-4 of the written statement that the petitioner left the twin sons in the native village of husband on the day of Mahalaya in the year 2007. There is further evidence/material from the pleading of the husband/opposite party No. 2 that both the minors again got into the custody of the petitioner/wife being kidnapped on 21.8.2010, as recovered to the custody of the husband by the order of a Court dated 7.12.2011. From the entire gamut of the pleading, it clearly appears that the custody of the minors was for more than 8 years whereas the husband-opposite party No. 2 got their custody for less than 3 years by the time, the case was instituted in the Judge, Family Court, Bhubaneswar. Further, scan of the entire pleading and argument of both the sides also make it clear that both the minors spent most of their time with the petitioner and therefore, there is no doubt that the ordinary place of residence for both the children is with the petitioner in the district of Khurda.

12. From the pleading, the observations of this Court based on the decision rendered by this High Court in the case of Konduparthi Venkateswadu and others v. Ramavarapu Viroja Nandan and others, AIR 1989 Ori 151 and Amal Saha v. Smt. Basna Saha, AIR 1988 Gau 22 this Court is of the view that the ordinary place of residence of both the minor being in the district of Khurda the case filed by the petitioner was very much maintainable in the Court of Judge Family Court, Bhubaneswar, district Khurda. Consequently while holding the impugned order dated 8.10.2012 in C. P. No. 106 of 2010 passed by the Judge, Family Court, Bhubaneswar as bad, this Court set aside the same and directs the Judge Family Court, Bhubaneswar to hear the C. P. No. 106 of 2010 on merit and dispose the same in accordance with law.

13. The writ petition stands allowed but however, there is no order as to cost.

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