
(1954) 04 GUJ CK 0003
In the Gujarat High Court
Case No : Civil Appeal No. 2 of 1953

Bai Shri Arunkumari	Vs	APPELLANT
Jhala Harpalsingh Natwarsingh		RESPONDENT

Date of Decision : 30-04-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, 104(1), 104(2), 4
Guardians and Wards Act, 1890 — Section 25, 9(1)
High Court Ordinance — Section 22(1) , 22(2)

Citation : (1954) 04 GUJ CK 0003

Hon'ble Judges : Shah, C.J.;Baxi, J

Bench : Division Bench

Advocate : M.O. Shah, for the Appellant; H.V. Trivedi, for the Respondent

Final Decision : Dismissed

Judgement

Baxi, J.—This appeal is against the decision of Mr. Justice Chhatpar setting aside the order of the District Judge, Surendranagar, and remanding the case for recording evidence on the issue of jurisdiction and also on the issue whether the Respondent's application was maintainable u/s 25, Guardians and Wards Act.

2. The Respondent applied to the District Court, Surendranagar, for the custody of his minor son u/s 25 of the Act. The application was made against the Appellant, who is his wife and the mother of the minor. The minor is about six years of age. The Respondent alleged in the application that the Appellant and the minor lived with him at Raj Charadi. In March 1950 she left him for good taking the minor with her without his permission and went to live with her father at Badanwada and has since been living with him.

The application was opposed by the Appellant on various grounds. She contended inter alia that the District Court at Surendranagar had no jurisdiction to entertain the application. She also contended that the application u/s 25 for the custody of the minor son was not competent. The learned District Judge held that the Court having jurisdiction to entertain the application would be the Court

in whose jurisdiction the minor ordinarily resided at the time of the application and as he resided at Bandanwada this Court had no jurisdiction to entertain the application. He also held that the application was not maintainable.

The Respondent preferred an appeal, to the High Court in which Mr. Justice Chhatpar, sitting as a single Judge, decided that the question of the residence of the minor was a question of fact depending upon many factors, such as the circumstances under which the minor was removed from the place of his natural guardian, the conduct of the guardian, the period of the stay of the minor at the place where jurisdiction was sought to be conferred upon the Court, etc. Consequently the District Judge should have recorded evidence about the circumstances under which the parties parted from each other and remanded the case for recording evidence on this issue. He also-directed that the issue about the maintainability of the application should be decided after recording evidence. The Appellant has preferred this appeal against this decision.

3. u/s 25, Guardians and Wards Act, an application for the custody of the minor has to be made to the Court having jurisdiction to entertain an application under the Act for an order appointing or declaring a person to be guardian. u/s 9 (1) such application has to be made to the District Court having jurisdiction in the place where the minor ordinarily resides. It is clear therefore that the application u/s 25 has to be made to the Court, within whose jurisdiction the minor ordinarily resides at the time of the application. The Respondent is the natural guardian of the minor under the Hindu Law and is entitled to the custody of the minor. He resides at Raj Charadi within the jurisdiction of the District Court at Surendranagar but there is no presumption that the minor is deemed to reside at the place where his natural guardian resides, and the place of residence of the natural guardian is not the determining factor in "deciding the question of the Court's jurisdiction, except as one of the circumstances to be considered in determining the ordinary place of residence of the minor. Even if such presumption can be raised, it is a weak presumption liable to be easily rebutted by proof of other circumstances, showing that the ordinary place of residence of the minor is other than the place of residence of his natural guardian. Therefore from the mere fact of residence of the Respondent in Raj Charadi it cannot be presumed without taking into account all the circumstances of the case that the minor ordinarily resides there.

4. Numerous decisions on the point have been, referred to by Mr. Justice Chhatpar in his judgment. These decisions were also referred in the arguments before us. A close analysis of some of these decisions shows that the question as to the place of ordinary residence of the minor has always been regarded as a question of fact and the Courts have determined it in the light of the circumstances proved in each case.

The earliest decision of the Bombay High Court, to which we were referred, was - "Rev. Robert Ward v. Velchand Umedchand 11 Bom LR 1137 (A). In that case a minor was kept by his brother at the American Mission in Baroda for 2 1/2 years.

He was thereafter brought by his brother to Ahmedabad without the consent of the Mission authorities and stayed with him for a period of 28 days. The minor was then removed to Baroda by Ward and Anr. . Thereupon the brother applied to the . District Court of Ahmedabad to be appointed guardian of the minor. The High Court held that Baroda was the place where the minor ordinarily resided within the meaning of Section 9, Guardians and Wards Act, this in spite of the fact that the brother, who was the natural guardian of the minor, resided at Ahmedabad.

In the next case of Lakshman Morshet Mapuskar Vs. Gangaram Narayan Gudekar, , it was held that the residence of a minor was a matter of fact and not a matter of presumption. In that case the question was about the residence of a minor married girl. Although her husband and natural guardian resided in the Poona District, she had resided all along at Khed in Ratnagiri District except for 4 or 5 months, during which had gone to live with her husband in Poona on the date of the application, she was residing with her parents in Khed. The Court held on these facts that the minor's ordinary place of residence was in Ratnagiri District and not Poona.

The next case is "Chimanlal Ganpat and Chimanlal Ganpat Vs. Rajaram Maganchand Oswal,). In that case the minor's natural guardian, who lived in the Kolhapur District, applied for the custody of the minor to the District Court of Poona, where the minor was sent to live with some relations, and in consequence of disputes regarding her engagement, they declined to allow her to return to him when he wanted her back. The minor was living with the relatives from April 1934 to January 1935. On these facts it was held that the minor was ordinarily residing within the jurisdiction of the District Court of Poona at the material time. These decisions lay down that it is the ordinary residence of the minor and not the residence of the natural guardian that determines the jurisdiction of the Court.

In "Sm. Vimalabai v. Baburao AIR 1951 Nag 179 (D), Mudholkar J. observed in the Course of his judgment that under the Hindu Law, the father is the natural guardian of his minor children and they must be deemed to reside where he resided. These observations must however be taken with reference to special facts of the case. In that case the minor girl was actually living with her father for about a year before the application was made, although prior thereto she was living with her mother in Anr. district: In fact the learned Judge approved of the Bombay High Court's decision in Chimanlal Ganpat Vs. Rajaram Maganchand Oswal, in which the Court did not act on any presumption arising out of the place of residence of the natural guardian. In "Mt. Nazir Begum v. Ghulam Qadir Khan AIR 1938 Lah 313 (E-F), the custody of the minor was with the Respondents. She was sent away by them to a female relative residing in a neighbouring State with the object of evading law. Under the circumstances it was held that the minor's residence in the State was incidental and temporary only and the permanent residence was at Multan, where the Respondents resided. This case

has no application to the facts of the present case as the minor here is not alleged to have been taken away by the Appellant with the intention of evading law.

5. We therefore agree with Mr. Justice Chhatpar that the question of residence of the minor is a question of fact which must be determined in the light of circumstances of each case. But with respect to him we do not think that it is necessary to remand the case for recording evidence about the actual place of the minor's residence. The question can be disposed of on the Respondent's own admission in his application to the District Judge.

He alleges that the Appellant left him in March 1950 taking the minor with her without the intention of returning home. for 19 months, thereafter, he took no steps to obtain custody of the minor. His application shows that it was after the Appellant filed a suit against him for maintenance for herself and for the minor that he thought of making the present application. The ground on which jurisdiction is sought to be conferred on the Court is that the minor was taken away from Raj Charadi where the Respondent was residing. The application nowhere mentions that the minor ordinarily resides within the jurisdiction of the Court. These averments make it clear that the Respondent himself accepted the position that the minor's ordinary place of residence on the date of the application was at Bandanwada and that application was made to the District Court "at Surendranagar on the ground of his own residence and on the ground that 19 months before the application the minor had¹ resided with him. The application itself assumes that the minor's ordinary place of residence on the date of the application was not in Raj Charadi but at Bandanwada and therefore must fail on the ground of want of jurisdiction.

The question about the maintainability of the application u/s 25 was not argued before us and it is not necessary to express an opinion on that question.

6. This appeal has come before us under the certificate of Mr. Justice Chhatpar u/s 22 (a) (2) of the High Court Ordinance that the case is a fit one for appeal to the Division Bench. However when granting the certificate our learned brother expressed a doubt about the competency of the appeal and left the question to be decided by the Division Bench.

7. An appeal is provided against an order of remand under Order 43, Rule I(u), Code of Civil Procedure, as amended in Saurashtra by Notification No. HCR/L-4(6) 1-3060 dated 22-9-1950 read with Section 104(1) (i), Code of Civil Procedure. Sub-section (2) provides that no appeal shall lie from any order passed in appeal under Sub-section (1) of the section. The decision of Mr. Justice Chhatpar having been given in second (Sic) appeal, no further appeal lies under the Code against his decision. Such appeals are provided only by Section 22(a) (1) of the High Court Ordinance. Now Section 4 of the Code provides that in the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect XXX any special jurisdiction or power

conferred or any special form of procedure prescribed, by or under any other law for the time being in force. These provisions are wide enough to cover appeals to a Bench under the High Court Ordinance. The appeal provided under the High Court Ordinance from a decision Of a single Judge to the Bench is a special jurisdiction within the meaning of Section 4 of the Code and cannot be affected by the provisions of Section 104, which deal only with appeals under the Code, that is, appeals to the High Court from the decisions of Courts subordinate to it. A Judge of the High Court sitting singly is not a Court subordinate to the High Court and Section 104 does not bar appeal from his decision to the Bench. This was the ratio decidendi in - Vaman Ravji Kulkarni Vs. Nagesh Vishnu Joshi, , which was an appeal under Clause 15 of the Letters Patent from the decision of a single Judge. We therefore hold that an appeal under a certificate from an order of remand passed by the single Judge of High Court is competent under the High Court Ordinance. In the result, the appeal succeeds and the Respondent's application is ordered to be dismissed. There will be no order for costs of this appeal.

Shah, C.J.

8. I agree.