

**(2011) 11 MAD CK 0190**

**In the Madras High Court**

**Case No : C.R.P. (PD) No. 453 of 2010**

C. Narasaraju No. 61, Nandini Layout Halanalli Extension T.  
Narasipur Road Mysore - 560010

**APPELLANT**

**Vs**

S. Ramesh

**RESPONDENT**

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**Date of Decision : 11-11-2011**

**Acts Referred:**

Guardians and Wards Act, 1890 — Section 25, 9, 9(1), 9(3)

**Citation : (2011) 11 MAD CK 0190**

**Hon'ble Judges : B. Rajendran, J**

**Bench : Single Bench**

**Advocate : P.J. Rishikesh for Mr. M. Narayanasamy, for the Appellant; T. Sivagnana Sambandam, for the Respondent**

**Final Decision : Allowed**

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## **Judgement**

Honourable Mr. Justice B. Rajendran

1. The petitioner has come forward with this revision petition aggrieved by the order dated 14.12.2009 passed by the Court below dismissing the I.A.No. 4176 of 2009 in OP No. 1109 of 2009 filed by him.

2. The Original Petition was filed by the respondent herein u/s 25 of the Guardian and Wards Act, praying to grant the custody of his minor son Sukresh.

3. According to the revision petitioner, he is the father-in-law of the respondent herein. The revision petitioner's daughter namely C.N. Shilpa was given in marriage to the respondent herein on 07.11.2003 and out of the wedlock the minor Sukresh, male, was born on 06.04.2005, however, during the child birth, the daughter of the revision petitioner and wife of the respondent herein namely C.N. Shilpa died. After the death of his daughter, the revision petitioner has been bringing up the minor child in Mysore. In fact, the revision petitioner also admitted the minor child in L.K.G. at Vidya Jothi School at Nadanahalli, Banur Road, Mysore where the minor child is presently studying. According to the

revision petitioner, the minor child was brought up, from the date of his birth, in Mysore, therefore, if at all, the respondent can seek custody of the child by filing appropriate application before the competent Court at Mysore and the Original Petition filed by the respondent seeking custody of the Minor Child at Madras is not maintainable. Therefore, he filed the application in I.A. No. 4176 of 2009 before the Court below u/s 9(3) of the Guardian and Wards Act, 1890 praying to pass an order returning the original petition filed by the respondent herein to be presented before the proper Court having jurisdiction for adjudication of the matter in controversy between the parties hereto. According to the revision petitioner, the court below at Madras has no jurisdiction to entertain the original petition filed by the respondent herein and if the proceedings are allowed to continue at Madras, he will be highly prejudiced. The Court below, without considering the jurisdictional issue, has dismissed the application filed by the revision petitioner on erroneous grounds. Therefore, challenging the order of dismissal passed by the court below, the present revision petition has been filed.

4. The respondent has not filed any counter before the court below to the I.A.No. 4176 of 2009 filed by the revision petitioner herein. In the original petition filed for custody of the minor child, the respondent herein would contend that his wife was admitted in the hospital at Mysore but during the child birth, she died after giving birth to the minor child. Immediately after the death of his wife, his mother-in-law requested him to leave the minor child with them and that they would handover the child in the next few months. The respondent also would contend that his mother-in-law also advised to get re-married inasmuch as he lost his wife at a young age. Thereafter, in the month of October 2005, the respondent sought the custody of the child but the revision petitioner and his family promised to handover the child in the month of November 2005. When such a request was renewed by the respondent during November, the revision petitioner and his family requested to return the child during January 2006. During January 2006, the revision petitioner and his family members have informed the respondent to take the child after two years. Under those circumstances, he allowed the minor child to remain in the custody of the revision petitioner and his family. Thereafter, when the respondent approached the revision petitioner to see the child on 21.05.2006, he was not permitted to see the child and he was manhandled. Therefore, he lodged a complaint with the local police, but they have not taken any action. As the respondent was prevented from seeing the child, he issued a notice dated 27.11.2007 to the revision petitioner to handover the custody of the child. A reply was sent by the revision petitioner with false and baseless averments, refusing to handover the custody of the minor child. Therefore, the respondent has filed the Original Petition seeking custody of the minor child.

5. As far as jurisdiction is concerned, the respondent would mainly contend that the jurisdiction for custody of the child will always be that of the place of residence of his or her parents since normally the child is expected to remain in the house of his parents. Whereas, in this case, the child was retained in custody

forcibly by the revision petitioner in his house and therefore, he has no other option to get custody of the minor child except to file the Original Petition before the Court below at Madras. Therefore, according to the respondent, the Court at Chennai is having jurisdiction to entertain the Original Petition.

6. The Learned Counsel appearing for the revision petitioner would vehemently contend that the minor child born in Mysore, brought up by the revision petitioner in Mysore and presently studying at Mysore. The minor child was never, ever in the custody of the respondent, father. Since the mother died immediately after the delivery, the revision petitioner has taken custody of the minor child and looking after the paramount interest of the minor child. If at all, the respondent wanted to get the custody of the minor child, he ought to have filed the Original Petition seeking custody before the competent Court at Mysore and the Court at Madras lacks jurisdiction to entertain the Original Petition. Under those circumstances, the revision petitioner has filed I.A.No. No. 4176 of 2009 before the Court below to pass appropriate orders to return the Original Petition by the respondent herein to be presented before the proper Court having jurisdiction for adjudication of the matter in controversy between the parties hereto. The court below dismissed the application without taking note of the facts and circumstances involved in the case especially when there is a specific bar u/s 9 of the Guardians and Wards Act to entertain the Original Petition. In this connection, the Learned Counsel for the revision petitioner relied on the decision of the Honourable Supreme Court reported in Ruchi Majoo Vs. Sanjeev Majoo, for the proposition that the test for determination of jurisdiction in respect of child custody u/s 9 of the Guardian and Wards Act will be the place of ordinary residence of the minor. The Learned Counsel for the revision petitioner further submits that the Honourable Supreme Court also clarified that where the minor ordinarily resides by interpreting the word "resides" and held that the word imply something more than a flying a visit or casual stay at a particular place. Therefore, according to the Learned Counsel for the revision petitioner, the court below failed to take into consideration the ordinary place of residence of the minor child at Mysore especially when the minor was, at no point of time, in the custody of the father, the respondent herein from the date of his birth. Only on hearing the amount awarded towards compensation, the respondent wants to take custody of the child for the purpose of getting the amount. The respondent has no concern for the welfare and well being of the minor child. In any event, the Learned Counsel for the revision petitioner would contend that the court below has no jurisdiction to entertain the Original Petition. The Learned Counsel for the revision petitioner also relied on the decision reported in (Smt. Aparna Banerjee vs. Tapan Banerjee) AIR 1986 Punjab and Haryana 113 wherein it was held that 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 lost. It is not the place of residence of the natural guardian that gives the jurisdiction to the Court under S. 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". 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. Such a finding rendered by the Punjab and Haryana High Court was also followed in the decision of the Andhra Pradesh High Court reported in (Harihar Pershad Jaiswal vs. Suresh Jaiswal) AIR 1978 Andhra Pradesh 13. Therefore, in the light of the above facts and circumstance of the case and the decision cited, the Learned Counsel for the revision petitioner prayed for allowing the revision petition.

7. Per contra, the Learned Counsel for the respondent would contend that the father is the natural custodian of the minor. The address of the child is automatically referable to that of the address of the father. In the present case, the child was and is in the illegal custody of the revision petitioner at Mysore for which the respondent also attributed motive. The Learned Counsel for the respondent would further contend that the revision petitioner herein claimed damages for medical negligence against the hospital authorities for the death of his daughter before the District Consumer Forum, Mysore in C.C. No. 266 of 2006 and the District Forum was pleased to pass an award for Rs.8,00,000/- as compensation. As against the said award, the hospital authorities have taken the matter on appeal before the State Commission at Bangalore where the dispute was compromised and a sum of Rs.8,50,000/- was received by the revision petitioner. In the proceedings before the Consumer Forum, the respondent, being the father and who had also spent lot of amount during the time of admission of his wife in the hospital, was not impleaded as a party and the entire compensation amount was received by the revision petitioner. According to the Learned Counsel for the respondent, only for the purpose of receiving the compensation amount, the revision petitioner forcibly retained the custody of the minor child. In any event, the father is the natural guardian of the minor child and therefore, the custody of the minor child should be given to the respondent. The revision petitioner, being the grand father of the minor child cannot be called as an interested person or custodian of the minor child. The revision petitioner also not proved that he can maintain the minor child better than the respondent. The ordinary place of residence of the minor child would be that of the address of the respondent/father. Therefore, the court below has jurisdiction to entertain the Original Petition and consequently, the dismissal of the application filed by the revision petitioner is valid and legal. In this connection, the Learned Counsel for the respondent relied on the decision reported in (Bhagyalakshmi and another vs. Narayana Rao) AIR 1983 Madras 9. In that case, an application for custody of the minor filed by the father in a Court having jurisdiction over his place was challenged on the ground that the children at that time stayed in a place beyond the jurisdiction of that Court and hence, the application was not laid in the Court with proper jurisdiction in view of Section 9(1) of the Act. this Court held that in the circumstance of the case, the ordinary residence of the minor u/s 9(1) was with their father and the application for custody was laid in the proper court. The

Learned Counsel for the respondent also relied on the decision reported in (Jagdish Chandra Gupta vs. Dr. Ku. Vimla Gupta) AIR 2003 Allahabad 317 for the proposition that the place where the minor ordinarily resides indicates a place where the minor is expected to reside but for the special circumstances, it excludes places to which the minor may be removed at or about the time of filing of the application for the enforcement of the guardianship and custody of the minor. The place has to be determined by finding out as to whether the minor was ordinarily residing and where such residence would have continued but for the recent removal of the minor to different places. Relying on the above decisions, the Learned Counsel for the respondent would contend that merely because the minor child was found in the custody of the petitioner/grand father at Mysore, that by itself will not be a bar for the Court at Madras to adjudicate the Original Petition filed by the respondent for custody of the minor child. Therefore, he would contend that the Court below has jurisdiction to entertain the Original Petition and he prayed for dismissal of the revision petition.

8. I heard the Learned Counsel for both sides and perused the materials placed on record. In this case, it is admitted by the respondent that the minor child born in Mysore, during the course of the child birth, his wife and daughter of the revision petitioner died at Mysore, the revision petitioner sued the hospital authorities for medical negligence at Mysore and right from the date of birth, the minor child was in the care and custody of the revision petitioner at Mysore. According to the respondent, he sought for custody of the minor child from the revision petitioner on various dates but he postponed the handing over of the custody of the minor and ultimately the respondent was prevented by the revision petitioner from seeing his own child. Therefore, it is evident that from the date of birth of the child, the child is in the custody of the revision petitioner at Mysore, even as per the admission of the respondent herein. The respondent did not aver anywhere in the Original Petition that the child was in his custody for some time at Madras. Therefore, the word "ordinary residence" used in Section 9 of the Guardians and Wards Act, in the facts and circumstance of the case on hand, shall mean that the child is ordinarily residing at Mysore.

9. In the decision relied on by the counsel for the petitioner in (Smt. Aparna Banerjee vs. Tapan Banerjee) AIR 1986 Punjab and Haryana 113 it was held that the word "ordinary residence" would mean the minor's actual residence where the minor happen to reside in a particular place and it must be taken into consideration in deciding the place where the minor ordinarily resides.

10. In the decision reported in (Bhagyalakshmi and another vs. K. Narayana Rao) AIR 1983 Madras 9, relied on by the Learned Counsel for the respondent, it was held that the ordinary residence of the minor u/s 9(1) was with their father. It was further held in that decision that mere temporary residence or residence by compulsion at a place however long cannot be equated to or treated as the place of ordinary residence. The residence of the minor with his mother at her maternal home, though for some years had necessarily be regarded as a

temporary one or under compulsion or force of circumstances and could not therefore be regarded as their ordinary place of residence, which connotes the idea of a settled home which in the instance case was the father's place of residence. The facts and circumstance that led to the decision mentioned supra can usefully be extracted hereunder:

7. The words "ordinarily resides" would in my view connote, a regular normal or settled home and not a temporary or forced one to which a minor might have been removed either by stealth or by compulsion. The place of residence at the time of the filing of the application under the Act does not help to ascertain whether a particular Court has jurisdiction to entertain the proceedings or not, as it would be easy to stifle proceedings under the provisions of the Act by the mere act of the moving the minors from one place to another and consequently from one jurisdiction to another. The question whether the minors were ordinarily residing in any particular place has to be primarily decided on the facts of the particular case. The paternal family house of the family residence may normally be taken to be the place of the ordinary residence of the minors as well. The words "ordinarily resides" are incapable of any exhaustive definition as those words have to be construed according to the purpose for which the enquiry is made. The intention of not reverting back to the former place of residence would normally be relevant, but in the case of minors, it is rather difficult to impute any such intention to them. It has also to be borne in mind that mere temporary residence or residence by compulsion at a place however long cannot be equated to or treated as the place of ordinary residence. Bearing in mind these considerations, it is necessary to ascertain from the materials available in this case as to where the minors "ordinarily resided" for purpose of the Act. There is no dispute that till 01.07.1975, the first appellant, the respondent and the minor children were all living together under one roof and thereafter the first appellant left Komarapalayam taking the children also with her and continued to live with her father's house at Kote Village with the children till the proceedings were initiated by the respondent under S. 25 of the Act..... It is rather difficult to hold that she had completely abandoned her husband's house at Komarapalayam as a place of residence and had decided permanently to stay at Kote. The minor children had been taken by the first appellant when she left her husband's abode, presumably on account of certain misunderstandings and quarrels that had arisen between the first appellant and the respondent and though the differences between them apparently had not been patched up later, there is nothing in the evidence which would disclose that there was any idea of abandonment of the family house at Komarapalayam on the part of the first appellant. At any rate, the minor children cannot be imputed with any intention of abandoning the family residence at Komarapalayam, as they are obliged to stay with their mother, who had taken them to Kote village. The residence of the minors at Kote Village, though for some years, has necessarily to be regarded as a temporary one or under compulsion or force of circumstances and could not be regarded as the ordinary place of residence, which as stated earlier, connotes the

idea of a settled home, which is only in Komarapalayam.

11. In the above decision rendered by this Court, it was clear that the custody of the minors were taken at a later point of time even though it was for long years. Under those circumstance, this Court held that merely because the minor children were in a different place, that cannot determine the jurisdiction of the Court to entertain the petition for custody. Therefore, the said decision relied on by the Learned Counsel for the respondent is not applicable to the facts and circumstance of this case on hand.

12. In the latest decision of the Honourable Supreme Court reported in Ruchi Majoo Vs. Sanjeev Majoo, the Honourable Supreme Court laid down parameters to be followed in relation to the jurisdiction of the Court to entertain petitions under the Guardian and Wards Act. In Para No.24, 26, 27, 28 and 46, it was held as follows:

24. It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the Court u/s 9 of the Act is the "ordinary residence" of the minor. The expression used is "where the minor ordinarily resides". Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy.

26. We may before doing so examine the true purpose of the expression "ordinarily resident" appearing in Section 9(1). This expression has been used in different contexts and statutes and has often come up for interpretation. Since liberal interpretation is the first and foremost rule of interpretation it would be useful to understand the literal meaning of the two words that comprise the expression. The word "ordinary" has been defined by Black's Law Dictionary as follows:

Ordinary (adj.) - Regular, usual, normal; common; often recurring; according to established order, settled; customary, reasonable; not characterised by peculiar or unusual circumstances; belonging to; exercised by, or characteristic of, the normal or average individual.

The word "reside" has been explained similarly as under:

Reside. - Live, dwell, abide, sojourn, stay, remain, lodge (Western-Knapp Engg. Company, v. Gilbank, F 2d at p.136.) To settle oneself or a thing in a place to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically, to be in residence, to have an abiding place, to be present as an element, to inhere as a quality, to be vested as a right. (Bowden v. Jensen, SW 2d at p.349)

27. In Webster's Dictionary also the word "reside" finds a similar meaning, which may be gainfully extracted:

1. To dwell for a considerable time; to make one's home; live. 2. To exist as an attribute or quality with in. 3. To be vested with in.

In *Annie Besant v. G.Narayaniah*, the infants had been residing in the District of Chinglepet in the Madras Presidency. They were given in custody of Mrs. Annie Besant for the purpose of education and were getting their education in England at the University of Oxford. A case was, however, filed in the District Court of Chinglepet for the custody where according to the plaintiff the minors had permanently resided. Repeating the plea that the Chinglepet Court was competent to entertain the application Their Lordships of the Privy Council observed: (IA p.322)

The District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890. By the 9th section of that Act the jurisdiction of the Court is confined to infants ordinarily resident in the District. It is in Their Lordship's opinion impossible to hold that infants who had months previously left India with a view to being educated in England and going to the University of Oxford were ordinarily resident in the District of Chinglepet.

46. In the light of what we have stated above, the High Court was not, in our opinion, right in holding that the respondent's version regarding the letter in question having been obtained under threat and coercion was acceptable. The High Court appeared to be of the view that if the letter had not been written under duress and coercion there was no reason for the respondent to move a guardianship petition before the US Court. That reasoning has not appealed to us. The question whether or not the letter was obtained under duress and coercion could not be decided only on the basis of the institution of proceedings by the respondent in the US Court. If the letter was under duress and coercion, there was no reason why the respondent should not have repudiated the same no sooner he landed in America and the alleged duress and coercion had ceased. Far from doing so the respondent continued to support that decision even when he was far away from any duress and coercion alleged by him till the time he suddenly changed his mind and started accusing the appellant of abduction. The High Court failed to note these aspects and fell in error in accepting the version of the respondent and dismissing the application filed by the appellant. In the circumstances we answer Question No.1 in the negative.

13. In the above decision, the Honourable Supreme Court, taking into consideration the various events between the parties concluded that in the absence of any allegation of duress, compulsion or threat in retaining the custody of the minor child by the mother, the Court at Delhi has got jurisdiction.

14. It is well settled that the question whether one is ordinarily residing at a given place depends so much on the intention to make that place one's ordinary abode. In this case, there is a clear admission in the Original Petition by the respondent himself that the custody of the minor child was with the revision

petitioner herein right from his birth at Mysore. Therefore, I hold that the ordinary residence of the minor, in this case, is Mysore where the revision petitioner is residing and having the custody of the minor child right from the date of his birth. The revision petitioner has also proved the custody of the minor with him from the date of his birth and he has also admitted the child in L.K.G. in a school at Mysore. Under those circumstances, the Court below erred in dismissing the application filed by the revision petitioner herein praying to pass an order returning the original petition filed by the respondent herein to be presented before the proper Court having jurisdiction for adjudication of the matter in controversy between the parties hereto. The order passed by the court below is also not sustainable in the light of the decision of the Honourable Supreme Court reported in Ruchi Majoo Vs. Sanjeev Majoo, . Therefore, the Court below has no jurisdiction to entertain the petition filed by the respondent

15. In the result, the Civil Revision Petition is allowed and the order dated 14.12.2009 made in I.A.No. 4176 of 2009 in OP No. 1109 of 2009 passed by the Principal Family Court at Chennai is set aside. No costs. The court below is directed to return the Original Petition filed by the respondent herein in O.P. No. 1109 of 2009 so as to enable the respondent herein to present it before the appropriate Court at Mysore.