

(1988) 08 OHC CK 0029

In the Orissa High Court

Case No : Misc. Appeal No. 24 of 1988

Konduparthi Venkateswarlu and Others

APPELLANT

Vs

Ramavarapu Viroja Nandan and Others

RESPONDENT

Date of Decision : 02-08-1988

Acts Referred:

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

Citation : AIR 1989 Ori 151

Hon'ble Judges : G.B. Patnaik, J

Bench : Single Bench

Advocate : B.L.N. Swamy, for the Appellant; B.B. Ratho, for the Respondent

Final Decision : Dismissed

Judgement

G.B. Patnaik, J.—This appeal is directed against the order of the learned District Judge, Ganjam who by the impugned order has held that he has jurisdiction to deal with the case.

2. The appellants are in custody of the minor child of respondent No. 1 after the death of the wife of respondent No. 1. Respondent No. 1 is a permanent resident of Berhampur town in the district of Ganjam. He had married the daughter of appellant No. 2 on 8-4-1979 and both of them came to Phulbani on 27-2-80 where they were serving, a child had been born out of their wedlock and was also with them at Phulbani. On 21-5-86, the wife of respondent No. 1 fell ill and, therefore, the said respondent No. 1 took his wife and child to his father-in-law's house at Visakhapatnam and left them there for better treatment. But as respondent No. 1 was not pulling on well with his in laws, he himself came away. The wife of respondent No. 1 died on 31-5-80 and the minor child who had accompanied his mother remained there at Visakhapatnam. Respondent No. 1 approached his in-laws to get back his son, but they refused to hand over the child to him. While the minor boy thus continued to remain at Visakhapatnam and respondent No. 1 could not get back his son he filed an application for the custody of his son u/s 25 of the Guardians and Wards Act before the learned

District Judge, Ganjam. The appellants appeared before the learned District Judge pursuant to notice served on them and filed an application that the District Judge, Ganjam had no jurisdiction to entertain the application since the minor child ordinarily resides at Visakhapatnam and u/s 9 of the Guardians and Wards Act, it is the District Judge having jurisdiction in the place where the minor ordinarily resides can entertain an application. The said application of the appellants having been rejected by the impugned order, the present appeal has been filed :-

3. There is no dispute with regard to the facts stated earlier. The only dispute centres round is an interpretation of Section 9 of the Guardians and Wards Act (hereinafter referred to as the "Act"), more particularly the true import and meaning of the expression "ordinarily resides u/s 9(1) of the Act. For better appreciation of the point in issue, Section 9(1) of the Act is extracted hereunder : --

"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."

The bone of contention between the parties is, according to the appellants, the minor ordinarily resides at Visakhapatnam whereas according to the respondents, the minor ordinarily resides either at Berhampur, the permanent place of residence or at Phulbani, the place where he was staying with his father, but for his accompaniment with his mother to Visakhapatnam where his mother died.

4. Mr. B.L.N. Swamy, the learned counsel for the appellants contends that ever since the death of the mother of the minor child in the year 1986, the minor having continued to reside at Visakhapatnam with his grand- mother and uncle, it must be held that he ordinarily resides there at Visakhapatnam for the purpose of S. 9 of the Act and, therefore, any application has to be filed within the jurisdiction of the District Judge, Visakhapatnam.

Mr. Ratho, the learned counsel for the father-respondent No. 1 on the other hand, contends that Berhampur being the permanent residence of the father as well as of the minor child and the minor had gone to Visakhapatnam only with his mother" and continued to remain there because of his mother's death, for the purpose of S. 9 of the Act it must be held that the minor ordinarily resides within the jurisdiction of the District Judge, Berhampur and, therefore, the District Judge, Berhampur has the jurisdiction to entertain the application.

5. Mr. Swamy in support of his contention relied upon a decision of the Rajasthan High Court in the case of Smt. Vimla Devi Vs. Smt. Maya Devi and Others, and a decision of the Andhra Pradesh High Court in the case of Harihar Pershad Jaiswal Vs. Suresh Jaiswal and Others, whereas Mr. Ratho, the learned counsel for respondent No. 1 places reliance on the decisions in the cases of Jamuna Prasad Vs. Mst. Panna and Others, ; Bhola Nath Vs. Sharda Devi, and Sarada Nayar Vs.

Vayankara Amma and Others, . The learned counsel for the parties stated that there is no decision of this Court nor is there any decision of the Supreme Court on the point. The place where the minor ordinarily resides so as to confer jurisdiction on the concerned District Judge, has to be interpreted in each case depending upon the facts and circumstances of that case. Residence of a minor is a matter of fact. By use of the expression "ordinarily resides" the Legislature obviously meant that it is more than a temporary residence even though such period may be considerable. A temporary residence at a particular place or residence by compulsion at a place however long, cannot be treated as the place of ordinary residence. Similarly, the words "ordinarily resides" are not identical and cannot have the same meaning as "residence at the time of the application". The purpose for using the expression "where the minor ordinarily 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 or in other words, the place where the minor would have continued to remain but for his removal. The learned Judge of the Rajasthan High Court in the case of Smt. Vimla Devi v. Maya Devi AIR 1981 Raj 211 after considering the decisions of the Allahabad, Assam, Gujarat and Punjab High Courts came to the conclusion that since the minor had left her father's place along with her mother since she was only one month old and continued to remain with her mother at Bandikui, it cannot be said that the District Court at Bhilwara where her father was living can have the jurisdiction to entertain an application under the provisions of the Guardians and Wards Act. In other words, it was held that the minor cannot be considered to have ordinarily resided at Bhilwara within the meaning of S. 9 of the Act on the date of the presentation of the application. While taking the aforesaid view, the learned Judge also considered the contrary view expressed in AIR 1954 Saurashtra 13 (Jhala Harpalsinh Natwar Sinhji v. Bai Arunkunvar); Chandra Kishore and Another Vs. Smt. Hemlata Gupta, and Sarada Nayar Vs. Vayankara Amma and Others, . The learned single Judge of the Andhra Pradesh High Court in the case of Harihar Pershad Jaiswal Vs. Suresh Jaiswal and Others, also considered the expression "place of ordinary residence" used in Section 9 of the Act. It was held by the learned Judge that (at p. 18 of AIR) : --

".....It is not the place of residence of the natural guardian that gives the jurisdiction to the Court u/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."

In the facts and circumstances of that case it was held that the minor's ordinary place of residence could not be at Hyderabad merely because the father who is the natural guardian was residing at Hyderabad. The aforesaid two decisions no doubt support the contention of Mr. Swamy, the learned counsel for the appellants to a great extent.

6. A Bench decision of Patna High Court in the case of Bhola Nath Vs. Sharda Devi, considered S. 9(1) of the Act. Their Lordships held (Para 6) : --

"The question as to the ordinary residence of the minor must be decided on the facts of each particular case and generally, the length of residence at a particular place determines the question. The expression "the place where the minor ordinarily resides" means the place where the minor generally resides and would be expected to reside but for special circumstances."

In that particular case, the child lived at Buxar within the jurisdiction of the District Court of Shahabad and was stealthily taken by the father. It was held that the District Judge of Sahabad had the jurisdiction to entertain the application by the child's mother for guardianship. Generally in the cases cited at the Bar, the dispute is between the father and the mother with regard to the custody of the child and in that context, S. 9(1) of the Act has been interpreted depending upon the facts and circumstances of the case. There cannot be any doubt that the father is the legal guardian of a minor child, both under the Hindu law as well as under the Guardians and Wards Act. In all matters under the Guardians and Wards Act, paramount consideration is the interest of the minor. It is the welfare and interest of the minor which should weigh with the Court in interpreting a particular provision under the Guardians and Wards Act. Normally the minor child would have continued with his father and mother and his permanent residence at Berhampur, it is only by coincidence 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 child remained at Visakhapatnam. In the aforesaid circumstances, I am unable to hold that Visakhapatnam would be considered as the place where the minor ordinarily resides. On the other hand, the minor's place of residence has been temporarily shifted to Visakhapatnam though for quite sometime because of the eventuality that his mother fell seriously ill and had to be shifted to Viskhapatnam. Since the permanent residence of the father and also of the minor child is at Berhampur and they had in the fact remained in Orissa and it is only his father who had taken him along with his mother to Visakhapatnam for the treatment of his mother, the ordinary place of residence of the minor must be held to be at Berhampur and, therefore, the District Judge, Ganjam was right in his conclusion that he has jurisdiction u/s 9 of the Act to entertain the application for the custody of the child. I do not find any infirmity in the said order so as to be interfered with by this Court. Even the decision of the Rajasthan High Court on which the learned counsel for the appellants placed strong reliance also lays down that the "place of ordinary residence" has to be decided in the facts and circumstances of each case.

7. In the result, this appeal fails and is accordingly dismissed, but in the circumstances without any order as to costs.