

(2004) 03 KAR CK 0041
In the Karnataka High Court
Case No : M.F.A. No. 8093 of 2003

Mr. Abraham G. Karimpanal and Others

APPELLANT

Vs

Nil

RESPONDENT

Date of Decision : 08-03-2004

Acts Referred:

Guardian and Wards Act, 1890 — Section 10, 26, 4 (5), 47, 7

Citation : AIR 2004 Kar 321 : (2004) 3 CivCC 155 : (2004) ILR (Kar) 1840 : (2004) 4 KarLJ 15 : (2004) 2 KCCR 1338 : (2004) 3 RCR(Civil) 735

Hon'ble Judges : S.R. Nayak, J; Ram Mohan Reddy, J

Bench : Division Bench

Advocate : Ravi Mallimath, for Subhash Mallapur, for the Appellant;

Final Decision : Allowed

Judgement

S.R. Nayak, J.—The appellants herein being aggrieved by the order dated 06.09.2003 passed in G & WC No. 61 of 2003 on the file of the II Additional Principal Judge, Family Court at Bangalore, for short, "the Family Court" have preferred this appeal u/s 47 of the Guardian & Wards Act, 1890, for short, "the Act".

2. The Family Court by the impugned order has returned the petition filed by the appellants herein under Sections 7,10 and 26 of the Act for presentation of the same before the jurisdictional Court in the State of Tamilnadu having opined that it has no jurisdiction to entertain that petition.

3. The case of the appellants, in brief, is as follows: the first and second appellants are a couple of Indian nationality and domicile. "The appellants 1 and 2 are aged about 33 and 32 years respectively. The first appellant was born on 16.02.1970 and second appellant on 15.01.1971. The first appellant and the second appellant were married on 04.01.1996. The first appellant is employed as a Consultant at Orchard Advertising Pvt. Ltd., Bangalore and his monthly salary from the said profession at present is Rs. 52,500/-. The second appellant is a

housewife and looks after the family house. The first and second appellants live in a rented house in Bangalore. The first appellant owns about 15.22 acres of ancestral property in Kerala. In addition, the appellants 1 and 2 have other movable properties like jewellery, LIC policies, T.V. Sets, Bank accounts, household and personal effects. Although the first and second appellants were married in the year 1996, are not blessed with a child of their own. The first appellant suffers from infertility. In spite of various medical treatment, that defect of the first appellant could not be rectified. Since the first and second appellants could not have a child of their own, they decided to seek guardianship of minors as an alternative to have a family with children. The relatives of appellants 1 and 2 and their friends and well-wishers have agreed to their idea and they have come forward to support the guardianship proposal of the appellants 1 and 2. The first and second appellants are physically fit and healthy and show no symptoms of either physical or mental disease or physical incapacity affecting their fitness to have custody of and to educate the children taken under guardianship. The appellants 1 and 2 have a respectable family background and clean social and police records.

4. The minor AADYA TERESA previously known as Pavithra is a female child and said to have born on 27.02.2002 from out of the wedlock of her natural biological parents. The parents of the minor were not in a position to look after and bring up the minor and, therefore, they out of their free Will handed over the minor to the Government Health Team, Dharmapuri, in Tamilnadu State and left the place leaving no clue of their whereabouts. When the biological parents of minor handed over the minor to the Government Health Team, they expressed their inability to look after and bring up the minor due to their poverty and requested the Government health team to look after and to bring up the minor or to place her with a suitable couple in India or abroad, who are willing to give her a good home and secure her welfare and future prospects.

5. The Institution of Anantha Ashram Trust, H.C.F post Mathigiri situate in Hosur in the State of Tamilnadu, the third appellant in this appeal, is a Trust registered under the Indian Trust Act and processes in-country adoption of Indian minor children. Since the Government Health Team to which the custody of the minor was handed over by the biological parents of the minor is not an Adoption Agency, they in turn transferred the custody of the minor to the third appellant-Trust.

6. The appellants 1 and 2 desirous of being the guardian of the minor approached the third appellant with necessary records and information. The third appellant having made a thorough verification of all the relevant records and the facts stated by them and conducting a thorough enquiry into the family background and antecedents of appellants 1 and 2, their living conditions, their mutual compatibility, their temperaments, their social stature, police and criminal records and being satisfied of the good faith, competence and qualifications of the first and second appellants and thinking that the proposed move is in the

best interest of the minor decided to give the minor in guardianship to the first and second appellants, issued no objection to the first and second appellants for being appointed as guardians of the minor Aadya Teresa with leave to take her out of Bangalore to any other place in India or abroad.

7. The appellants pleading as above filed a petition under Sections 7, 10 and 26 of the Act for guardianship of the minor. The family Court by the impugned order directed return of the petition for presentation of the same before the jurisdictional Court in the State of Tamilnadu. The family Court has opined that the minor Aadya Teresa is "an ordinary resident of Hosur" and since Hosur does not come under the territorial jurisdiction of the family Court at Bangalore, it has no jurisdiction to entertain the petition. In addition, the family Court has also pointed out that the Scrutiny Officer Karnataka State Council for Child Welfare in his letter dated 20.06.2003 addressed to the Indian Council for Child Welfare of Tamilnadu State has opined that it would have been appropriate for the scrutinizing agency in the State of Tamilnadu to undertake the scrutiny of the proposal and make appropriate recommendation.

8. We have heard Sri Ravi Malimath, learned Counsel for the appellant. Sri Ravi Malimath would contend that the minor has been ordinarily residing in Bangalore ever since 11.08.2002 and, therefore, the Family Court at Bangalore has territorial jurisdiction and in that view of the matter, the application contemplated u/s 9(1) of the Act would lie to the Family Court and, that the Family Court is not justified nor acted legally in returning the petition and directing the appellants to present the same before a jurisdictional Court in the State of Tamilnadu. Sri Ravi Malimath would place reliance on the judgments of the Supreme Court in SMT. JEEWANTI PANDEY v. KISHAN CHANDRA PANDEY and LAKSHMI KANT PANDEY v. UNION OF INDIA and also a judgment of the learned Single Judge of this Court in the case of GOPALA KRISHNA BENGGERI AND OTHERS.

9. The point that arises for decision is whether the Family Court at Bangalore has jurisdiction u/s 9 of the Act to entertain the petition of the appellants filed u/s 7 of the Act.

10. Section 9 contemplates the territorial jurisdiction of the Court in the matter of guardianship application. Section 9 reads as follows:

"Court having jurisdiction to entertain application: (i) 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."

11. For our purpose, Sub-section (i) of Section 9 is material. As per Sub-section (1) of Section 9, where the application is in respect to the guardianship of a person of the minor, it is to be filed at the Court under whose territorial jurisdiction the minor ordinarily resides. In order to give the Court jurisdiction for the purpose of appointment of guardian under Sub-section (1) of Section 9 and for passing orders u/s 25 of the Act, the minor must ordinarily be resident within the local limits of the Court's jurisdiction. If the minor does not ordinarily reside within the territorial jurisdiction of the District Court concerned, such District Court will have no jurisdiction to proceed under the Act. It is true, the mere fact that a minor is found actually residing at a place at a time when an application for guardianship is made u/s 7 of the Act does not determine the jurisdiction of the Court. It must be proved whether the minor ordinarily resides as laid down in Sub-section (i) of Section 9. It is the ordinary place of residence of the minor which determines the jurisdiction of the particular District Court to entertain application for guardianship of the minor. Such jurisdiction cannot be taken away by temporary residence elsewhere at the date of presentation of the petition u/s 7 of the Act. The words "ordinarily resident" have a different meaning than "residence at the time of the application". Both may be identical or may be different. That would depend on the facts of each particular case. To interpret the words "where the minor ordinarily resides" to mean "where the minor actually resides at the time of the application" may in some cases amount to rendering nugatory of the provisions of the Act. We say this because, if persons who have absolutely no right may remove a minor forcibly from his ordinary place of residence and keep him at a distant place where the application is made, objection can be taken that the application is not entertainable. The residence of a child does not and cannot depend upon the machinations of recalcitrant persons who apply for guardianship and/or custody of a minor. The latter residence, whether for a long period or for a short period, will also not make the residence of the minor the ordinary place of residence. All relevant attendant circumstances, the intention with which the minor had been removed, the person with whom the minor has been living and other relevant factors have to be taken into consideration. The words "ordinarily resides" obviously mean more than temporary residence, even though such residence is spread over a long period.

12. The term "residence" is an elastic word of which an exhaustive definition cannot be given; it is differently construed according to the purpose for which enquiry is made into the meaning of the term; the sense in which it should be used is controlled by reference to the object. "Residence" means dwelling in a place for some continuous time. The words "ordinarily resides" in Sub-section (i) of Section 9 of the Act mean more than a temporary residence even though the period of such temporary residence may be considerable. Residence may be

transitory or permanent. The former is residence simpliciter or causal residence. The latter connotes the place where for the practical purposes a person is expected to be ordinarily found. That is, the place where he is said to ordinarily reside. Generally speaking, residence is a matter of fact, and not a matter of presumption.

13. The words "ordinarily resides" fell for interpretation of the Apex Court and High Courts in large number of cases under various statutes. In SMT. JEEWANTI PANDEY's case (supra), the Supreme Court, dealing with a situation where jurisdiction of a Court was based on "the ground of residence" has observed in paragraph-12 as under:

"12. In order to give jurisdiction on the ground of "residence", something more than a temporary stay is required. It must be more or less of a permanent character, and of such a nature that the court in which the respondent is sued, is his natural forum. The word "reside" is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found. It is capable of being understood in its ordinary sense of having one's own dwelling permanently, as well as in its extended sense. In its ordinary sense "residence" is more or less of a permanent character. The expression "resides" means to make an abode for a considerable time; to dwell permanently or for a length of time; to have a settled abode for a time. It is the place where a person has a fixed home or abode. In Webster's Dictionary, "to reside" has been defined as meaning "to dwell permanently or for any length of time", and words like "dwelling place" or "abode" are held to be synonymous. Where there is such fixed home or such abode at one place the person cannot be said to reside at any other place where he had gone on a casual or temporary visit, e.g.. for health or business or for a change. If a person lives with his wife and children, in an established home, his legal and actual place of residence is the same. If a person has no established home and is compelled to live in hotels, boarding houses or houses of others, his actual and physical habitation is the place where he actually or personally resides."

14. Having construed the word "residence" in paragraph-12, the Apex Court proceeded to hold further in paragraph-13 thus:

"It is plain in the context of Clause (ii) of Section 19 of the Hindu Marriage Act, 1955 that the word "resides" must mean the actual place of residence and not a legal or constructive residence, it certainly does not connote the place of origin. The word "resides" is a flexible one and has many shades of meaning, but it must take its colour and content from the context in which it appears and cannot be read in isolation. It follows that it was the actual residence of the appellant at the commencement of the proceedings, that had to be considered for determining whether the District Judge, Almora had jurisdiction or not."

15. In LAKSHMI KANT PANDEY(supra), a three-Judge Bench of Supreme Court

dealing with the question that was raised before it, namely, whether a child under the care of a Social or Child Welfare Agency or hospital or orphanage in one State can be brought to another State by a Social or Child Welfare Agency for the purpose of being given in adoption and an application for appointment of guardian of such child can be made in the Court of the latter State held thus:

"We do not see any reason why in cases of this kind where a child relinquished by its biological parents or an orphan or destitute or abandoned child is brought by an agency or individual from one State to another, it should not be possible to apply for guardianship of the child in the Court of the latter State, because the child not having any permanent place of residence, would then be ordinarily resident in the place where it is in the care and custody of such agency or individual."

16. In *LAKSHMI DEVI v. CHANDRAKALA DAROJI* the Patna High Court held that ordinary residence of the minor means not the permanent house of the minor but place where the minor ordinarily resides either in his family or in a rented house and it need not be his own. In *UTTAM SINGH v. THAKAR SINGH*, the Court held that where a minor for whom a guardian of the person is sought to be appointed has been residing with his mother for about a year in a particular place, that place should, for purposes of Sub-section (i), be deemed to be the place where the minor ordinarily resides. The Court held that the fact that the minor's paternal grandfather has ancestral lands at some other place will not make the latter place his ordinary residence.

17. The principles stated above and the case law noticed would not leave us in doubt that while determining the jurisdiction of a Court to entertain the application u/s 7 of the Act on the ground of residence, what is material is actual residence of the minor at the commencement of the proceedings and not a legal or constructive residence of such minor unless where an artificial residence is created with bad faith. In the instant case, admittedly, the minor Aadya Teresa has been in the foster-care of the appellants 1 and 2 with effect from 11.08.2002 in a place which admittedly comes under the territorial jurisdiction of the Family Court at Bangalore. In an almost similar facts-situation, a learned Single Judge of this Court in the case of *GOPALA KRISHNA BENGGERI* (Supra) held that the Bangalore Court has jurisdiction to entertain the application filed u/s 7 of the Act.

18. Section 4(5) of the Act defines the word "Court". According to the definition, the word "Court" for the purpose of the Act is the District Court having jurisdiction to entertain an application under the Act for an order appointing or declaring a person to be a guardian of a minor in respect of his person or property. The Family Court Act, 1984, u/s 7, lays down that a family Court shall have and exercise all jurisdiction exercisable by any District Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation which, inter alia, includes, according to Clause (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor. Section 8

of the Family Court Act, specifically lays down that where a family Court has been established for any area, no District Court or any subordinate Civil Court referred to shall, in relation to such area, have or exercise any jurisdiction in respect of such suits or proceedings referred to in the Explanation which includes Clause (g). In the matter of Ashraya, this Court held that the proceedings for appointment of guardian of a child, even if the petitioner is a foreigner and the child concerned is an orphan or destitute, are proceedings of the nature falling u/s 7(1) Explanation Clause (g) of the Family Courts Act, 1984 and the family Court alone has the jurisdiction in the matter. Therefore, the Family Court though established under the Family Courts Act, 1984, has jurisdiction of the District Court conferred on that Court by the Act. In other words, the Family Court is the District Court for the purposes of the Act.

19. By a careful reading of the order of the Family Court impugned in this appeal, it appears that the Family Court was also influenced in the decision-making by the fact that the Scrutiny Officer, Karnataka State Council for Child Welfare, has opined that it would have been appropriate for the Scrutinizing Agency in Tamilnadu to undertake the scrutiny of the facts stated by the appellants in their petition and to make recommendation. There is no warrant for the Court to doubt the impartiality or efficacy or integrity of the Scrutiny Officer in Karnataka State in getting the required information and particulars which may have bearing on the decision-making. Be that as it may, the subjective opinion of the Scrutiny Officer, Karnataka State Council for Child Welfare can never be a determinative factor in deciding the jurisdiction of the Family Court to entertain the petition of the appellants filed u/s 7 of the Act. The jurisdiction of the Family Court has to be decided in the premise of the definition of "the Court" in Section 4(5) of the Act and the provisions of Section 9 of the Act. If a Family Court before which an application is made u/s 7 of the Act finds that the minor whose guardianship is sought in the application, ordinarily resides within its territorial jurisdiction, such Family Court is bound to entertain the application and decide that application on merit in accordance with law. The Court cannot refuse to exercise the jurisdiction u/s 7 of the Act on grounds of expediency or convenience or propriety. Jurisdiction of a Court is determined by law and not by considerations of expediency or convenience or choice of the parties who invoke the jurisdiction of such Court.

20. In conclusion, we hold that the Family Court at Bangalore has jurisdiction to entertain the petition filed by the appellants under Sections 7, 10 and 26 of the Act by virtue of the power conferred on it u/s 9(i) read with Section 4(5) of the Act and Section 7 of the Family Courts Act, 1984. In that view of the matter, we cannot sustain the impugned order of the Family Court.

21. In the result and for the foregoing reasons, we allow the appeal and set aside the impugned order and restore G & W.C. No. 61 of 2003 to the file of the Family Court and direct the Family Court to consider the petition filed by the appellants under Sections 7, 10 and 26 of the Act in accordance with law and on merits. The

Family Court is directed to dispose of the application as expeditiously as possibly and under any circumstance, within a period of four months. The Registry is directed to send a copy of this order forthwith to the Family Court.