
(2011) 11 AHC CK 0446

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 2282 of 2010

Smt. Bhagwati Pandey

APPELLANT

Vs

Shyam Narayan Pandey and Others

RESPONDENT

Date of Decision : 14-11-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, Order 7 Rule 10, 15, 17, 18
Family Courts Act, 1984 — Section 19, 7(1)
Guardians and Wards Act, 1890 — Section 25, 47, 7, 9, 9(2)
Hindu Minority and Guardianship Act, 1956 — Section 6
Specific Relief Act, 1963 — Section 41

Citation : (2012) 2 ADJ 118 : (2012) 3 AWC 2704

Hon'ble Judges : Pankaj Mithal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon"ble Pankaj Mithal, J.—Heard Smt. Abha Gupta, learned counsel for the plaintiff-appellant and Shri P.K. Tripathi, learned counsel appearing for defendant-respondent No. 1, the main contesting party, both of whom consented for the final disposal of the appeal.

2. Plaintiff-appellant Smt. Bhagwati Pandey has preferred this appeal u/s 47 of the Guardians and Wards Act, 1890 (hereinafter for short Act) against the order of the Family Court dated 13.10.09 directing for the return of the plaint for presentation before the proper Court of jurisdiction.

3. The plaintiff-appellant claims to be a legally wedded wife of defendant-respondent No. 1 Shyam Narain Pandey. She is said to have married him on 22.1.93 at Kanpur. It is also said that from the said wedlock a son Shubham @ Himanshu was born to them on 15.3.94 at Haldwani. He was removed from the custody of the plaintiff-appellant on 10.5.1994 at a tender age of one month 25 days while she was living at Kanpur.

4. The plaintiff-appellant instituted Original Suit No. 89/7 of 2009 before the

Family Court at Kanpur for mandatory injunction against the defendant-respondent No. 1 and arraying her minor son and two other persons as the other defendants in the suit. She sought mandatory injunction directing the defendants to the suit to handover the custody of her minor son to her and for a mandatory injunction to have the D.N.A. test of the plaintiff-appellant as well as her husband defendant-respondent No. 1.

5. The Court munsarin on the presentation of the plaint of the aforesaid suit reported that from the plaint allegations itself it is apparent that the minor whose custody is being claimed is living at Bareilly and as such the Family Court at Kanpur lacks territorial jurisdiction.

6. The above report was objected to by the plaintiff-appellant by filing written objections dated 21.8.09 contending that as the child was removed from her custody at Kanpur, the Court has jurisdiction in the matter. Upon hearing the plaintiff-appellant on 5.10.09, the Family Court vide impugned order dated 13.10.09 held that as the minor is ordinary resident of district Bareilly, the Court at Kanpur has no territorial jurisdiction and directed for the return of the plaint to the plaintiff-appellant for presentation before the proper Court of jurisdiction.

7. The First Appeal From Order has been filed u/s 47 of the Act.

8. The order impugned has not been passed under the provisions of the Act and therefore, appeal u/s 47 of the Act is per se not maintainable.

9. Section 47 of the Act provides for appealable orders. It does not include any order passed by the Family Court directing for the return of the plaint of the original suit for presentation before proper Court of jurisdiction.

10. In view of above, this appeal u/s 47 of the Act is not maintainable.

11. Since the order impugned has been passed by the family Court, appeal if any against the same would lie to the Division Bench of the High Court u/s 19 of the Family Court Act, 1984.

12. However, as the order impugned is an order directing for the return of the plaint for presentation before proper Court of jurisdiction it is an order purportedly passed under Order 7 Rule 10 C.P.C. against which First Appeal From Order is provided under Order 43 Rule 1(a) C.P.C.

13. In view of fact that the order impugned is amenable to appeal the appeal is being treated as an appeal under Order XLIII Rule 1(a) C.P.C. and not one u/s 47 of the Act.

14. u/s 6 of the Hindu Minority and Guardianship Act, 1956 the father is the natural guardian of a Hindu minor boy and in his absence it is the mother. It also provides that the custody of a minor, who has not completed the age of 5 years shall ordinarily be with the mother. Under the Hindu Law there are three classes of guardians of the person and property of a minor namely :

(i) Natural guardian;

(ii) Testamentary guardian; and

(iii) Guardian appointment under the Guardians and Wards Act, 1890

15. The aforesaid Act is a Special Act which contains the entire law relating to appointment of guardians of the minors/wards and all ancillary matters connected thereto. The power of the Court to appoint a guardian of a minor is contained in Section 7 of the Act whereas Section 25 of the Act empowers the Court for the return of the custody of the minor to his guardian, if he removed from the custody of his guardian.

16. The plaintiff-appellant has admittedly not applied u/s 7 of the Act for her appointment as the guardian of the aforesaid minor. She is not even made any application u/s 25 of the Act complaining about the removal of her minor from her custody and for making an order for the return of his custody. She has rather filed a suit for the custody of the minor that too in the form of suit for mandatory injunction.

17. Section 41 of the Specific Relief Act, 1963 specifically provides that an injunction cannot be granted in respect of the matters enumerated therein. One of the matters so enumerated in sub-section (h) of Section 41 of the Specific Relief Act is when equally efficacious relief can be obtained by any other mode of proceeding.

18. In view of Section 41 (h) of the Specific Relief Act, 1963 the suit for the custody of the minor may not be maintainable but no final opinion in this regard is being expressed lest it may prejudice the cause of the plaintiff-appellant in the Court below.

19. The aforesaid suit is concerning a matter covered by Section 7(1)(g) of the Family Courts Act, 1984 and as such is certainly triable by the Family Court but the moot question which arises for consideration in this appeal is as to whether the Family Court at Kanpur has the jurisdiction to entertain and try the suit in question.

20. It is a simple civil suit and is not in the nature of proceedings under the Act and as such the answer to the above question would depend upon the cause of action pleaded in the plaint.

21. Sections 15 to 20 C.P.C. provides for the place of suing.

22. The aforesaid provision does not specifically covers a matter relating to the custody of an minor but Section 20 C.P.C. provides that all other suits not provided earlier shall be instituted in a Court within the local limits of whose jurisdiction the defendants actually and voluntarily resides or carries on business or personally works for gain or where the cause of action, wholly or in part, arises.

23. It is settled law that cause of action means the whole bundle of material facts which would be necessary for the plaintiff-appellant to prove to enable him to succeed in the suit. [The State of Madras Vs. C.P. Agencies and Another,]

24. Further each and every fact pleaded in the plaint does not ipso facto lead to the conclusion that those facts give rise to the cause of action unless those facts pleaded are such which have nexus or relevance with the lis that is involved in the case. In other words, facts which have no bearing with the dispute involved in the case do not give rise to the cause of action and may not be necessary for determination of the jurisdiction of the Court. [Union of India and Others Vs. Adani Exports Ltd. and Another,]

25. A simple and a plain reading of the plaint of the present suit which has been filed as annexure 3 to the stay application reveals that it is admitted to the parties that the minor whose custody is being sought by the plaintiff-appellant was removed from the custody of the plaintiff-appellant on 10.5.94 when he was hardly one month and 25 days old and is residing at Bareilly since then. It is also admitted that he was born at Haldwani therefore, he had lived at Kanpur if at all for a period not more than one month 25 days.

26. The plaintiff-appellant is claiming custody of the minor who is residing at Bareilly. The fact of her earlier removal from her custody way back in 1994 is not relevant for the present suit. No such cause of action has been pleaded in the plaint. The only averment is that the cause of action had arisen with the jurisdiction of the Court at Kanpur but no fact or manner for such cause has been pleaded. In such a situation, the cause of action for the present suit cannot be the removal of the minor from the custody of the plaintiff-appellant allegedly while she was living at Kanpur. The cause of action for the suit simpliciter is the custody of the minor independent of the place from where he was removed from the custody of the plaintiff-appellant.

27. In view of above, no cause of action wholly or in part arises to the plaintiff-appellant for the present suit at Kanpur.

28. Section 9 of the Act provides for the Court having jurisdiction to entertain application regarding guardianship of a minor. The guardianship and the custody of a minor though two distinct concept yet are correlated and interdependent. For the purposes of guardianship it has been provided that an application may be made to the district Court having jurisdiction where the minor ordinarily resides. This is contained in Section 9(2) of the Act which is quoted below :

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.

29. In view of above, the place of ordinary residence of the minor acquires importance for the purposes determining the territorial jurisdiction of the Court. The Apex Court in *Union of India and Others Vs. Dudh Nath Prasad*, after comprehensively considering the dictionary meaning of the word "reside", "domicile" and the words "ordinarily resides" held that persons who at one time lived in the State of Bihar and even owned some property there but having shifted to the State of West Bengal long ago and living therein for all intents and purposes shall be treated to be ordinarily resident of the State of West Bengal. Therefore, the place of normal residence of a person would be regarded as the place where he ordinarily resides.

30. A division Bench of this Court in *Jagdish Chandra Gupta v. Dr Vimla Gupta*, AIR 2003 All 317 while dealing with a similar controversy in relation to the phrase "ordinarily resides" in context with application for appointment of guardian u/s 9 of the Act laid down that the expression "ordinarily resides" signifies something more than a temporary residence. The place where the minor generally resides and would be expected to reside would be one where he ordinarily resides.

31. Admittedly the place of resident of the minor in the present case is Bareilly and as he is living therein since 1994. His living at Kanpur at one time earlier for a short period of one month 25 days would not be his place of ordinary residence.

32. The decision of the Patna High Court in the case of *Bhola Nath v. Sharda Devi*, AIR 1951 Pat 489 : AIR 1960 All 235 parties name cited on behalf of the plaintiff-appellant are not of much help. The Patna decision lays down that the expression "the place where the minor ordinarily resides" means the place where the minor generally resides and would be expected to reside. In the Allahabad decision it has been laid down that the place of ordinary residence would depend on facts of each particular case. Similarly in the case of *K.C. Shashidhar v. Roopa*, ILR 1992 (Kar) 0 2791 the word "resides" must mean the actual place of residence and it certainly does not connote the place of origin.

33. In the light of the above authorities and on the basis of the principles laid down therein the minor who had admittedly been living since 1994 at Bareilly would ordinarily be a resident of Bareilly. Therefore, applying the principles governing jurisdiction of the Court for an application for appointment of a guardian under the Act, in the absence of any clear cut pleading with regard to the place of cause of action wholly or in part, the Court is of the view that the Family Court below has not committed any error in holding that it had no

territorial jurisdiction and in directing the return of the plaint to the plaintiff-appellant for presentation before proper Court of jurisdiction.

34. It may be noted that the minor was born on 15.3.1994 and is likely to attaining maturity on 15.3.2012. On attaining maturity it is up to him to choose with whom he wants to reside and as such at this stage no useful purpose would be served in continuing this litigation. However, it is upto the plaintiff-appellant to proceed as may be advised and if necessary to present the plaint before the proper Court of jurisdiction.

35. The appeal as such is devoid of merit and is dismissed but without any costs.