

(2002) 10 P&H CK 0117
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 199 of 1993

Smt. Sunita Jain and Others

APPELLANT

Vs

Mittar Sain Jain and Another

RESPONDENT

Date of Decision : 09-10-2002

Acts Referred:

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

Citation : (2003) 3 CivCC 261 : (2003) 133 PLR 641 : (2003) 2 RCR(Civil) 176 : (2003) 1 RCR(Civil) 440

Hon'ble Judges : M.M. Kumar, J

Bench : Single Bench

Advocate : Kamal Sharma, for the Appellant; R.S. Chahar, for the Respondent

Final Decision : Allowed

Judgement

M.M. Kumar, J.—This revision petition filed u/s 115 of the Code of Civil Procedure, 1908 (for brevity, "the Code") challenges the order dated 21.12.1992 dismissing the objections of the petitioner with regard to territorial jurisdiction entertained by the Additional District Judge, Bhiwani under the Guardian and Wards Act, 1890 (for brevity, "the Act").

2. Brief facts of the case unfolded in the pleadings of the parties are that respondent No. 1 Mittar Sain Jain had a son Sandeep Jain who was married to petitioner No. 1 Smt. Sunita Jain. From the wedlock two sons namely, Sonnu and Monnu were born. However, Sandeep Jain died. The allegations made in the petition of the respondents are that petitioner No. 1 Smt. Sunita Jain had married with respondent No.2-Jitender Kumar Jain. Therefore, Sonnu and Monnu have been neglected by petitioners 1 and 2 and the custody of Sonnu and Monnu is sought by the respondents. Petitioners opposed the application filed by the respondents for the custody of both the sons. On a preliminary objection having been raised, the trial Court framed an issue with regard to territorial jurisdiction and found that the Additional District Judge at Bhiwani has territorial jurisdiction u/s 9(1) of the Act. The operative part of the order reads as under:-

"I have given my due deliberations to these contentions of the learned counsel for the respondents Sunita Jain and others and in my view, there is no force in these submissions. There are a number of reasons for coming to this conclusion. In the first place admittedly, the respondents Sunita Jain was married with Sandeep and she gave birth to two sons Sonnu and Monnu. They continued to reside with the petitioners. She also continued to reside at Bhiwani till the first week of September, 1990 and this fact is not denied in the written statement. In the second place, it is admitted in the written statement that Sunita had contracted a second marriage with Jatinder Kumar Jain without informing or taking into confidence the petitioners. The jurisdiction for determining the ordinary residence is the question of fact. In the instant case the minors along with Sunita had been residing with the petitioners till September, 1990 and when the petitioners came to know that Sunita had contracted a second marriage they immediately commenced the petition for custody of the minors. The territorial jurisdiction is to be determined at the time when she left Bhiwani and not the fact that the minors are at present living at Rohtak with their adoptive father. Obviously, the place of ordinary residence would be Bhiwani and not Rohtak as she had left Bhiwani along with the children in September, 1990. I am fortified in my view by the authority contained in AIR 1937 Lah 797. This issue is answered in favour of the petitioners and against the respondents Sunita Jain and others."

3. A perusal of the above order shows that petitioner Sunita Jain left Bhiwani in September, 1990 and the petition for the custody of the children by the respondent was filed on December 22, 1990. It is also pertinent to mention that the husband of petitioner No. 1 Sandeep Jain died on June 6, 1989 and both the children were born in the years 1988 and 1989.

4. Mr. Kamal Sharma, learned counsel for the petitioners has argued that according to the mandate of Section 9(1) of the Act, the petition was to be filed for the custody of the children before the District Court having jurisdiction in the place where the minors ordinarily reside. According to the learned counsel, the petitioners ordinarily reside necessarily has to mean the place where the children have a permanent residence. In support of his submission, the learned counsel has placed reliance on a judgment of Division Bench of Gujarat High Court in the case of Hari Chand v. Virbbal AIR 1975 Guj 150 and also another Division Bench judgment in the case of Nandipati Rami Reddi and Others Vs. Nandipati Padma Reddy and Others, . In Hari Chand's case (supra) the expression "ordinarily reside", was interpreted meaning the court where the person having the custody of the child is permanently residing. This interpretation is discernible from paras 3 and 4 on which reliance has been placed by the learned counsel. In N. Rami Reddi's case also the Division Bench of the Andhra Pradesh High Court has observed that last two factors shall be taken into consideration to decide the fact about the residence of the minor.

5. Mr. R.S. Chahar, learned counsel for the respondent has argued that the jurisdiction of the District Court at Bhiwani, would be available to the respondent

for the simple reason that till September, 1990, i.e. 3 months before the filing of the present petition for the custody of the children, the minors were living at Bhiwani. The District Court at Bhiwani could not be deprived of its jurisdiction merely because the petitioner has decided to shift her residence at Bhiwani.

6. Having heard the learned counsel for the parties and perusing the impugned order, I am of the considered view that once the petitioner has made it absolutely clear to shift her abode to Rohtak and the custody of the children was with her, it cannot be concluded that the minors were living at Bhiwani at the time of filing of the petition in December, 1990. It has also become clear that the minors have been given in custody to the brother of the petitioner No. 1 and to one Jatinder Kumar who is stated to be the new husband of petitioner No. 1 to whom she was married after the death of her earlier husband Sandeep Jain. Therefore, for all intents and purposes, the minors were in custody of the petitioner would be deemed to be residing at Rohtak. Even otherwise, the paramount consideration for deciding the territorial jurisdiction namely welfare of the children would also lean towards taking the view that instead of minors travelling from Rohtak to Bhiwani, it would be appropriate if these proceedings are initiated in the courts at Rohtak. It may not be for the welfare of the minors to travel to Bhiwani because in order to ascertain the intention of the children, the courts have to summon the minors at an appropriate stage to the proceedings. Therefore, the order passed by the Additional District Judge, Bhiwani, is liable to be set aside and it is held the courts, at Bhiwani would not have any territorial jurisdiction to proceed with the application of the respondent for the custody of the children.

7. For the reasons recorded above, the revision petition is allowed. The order dated 21.12.1992 by the Addl. District Judge, Bhiwani, is set-aside. The District Judge, Bhiwani is directed to return the petition filed by the respondent so that it may be presented to the Court of competent jurisdiction at Rohtak.