

Asra Shakeel Vs. Shakeel Suleman

Asra Shakeel Vs. Shakeel Suleman

SooperKanoon Citation : sooperkanoon.com/331971

Court : Mumbai

Decided On : May-05-1999

Reported in : 2000(1)BomCR198

Judge : F.I. Rebello, J.

Acts : [Guardians and Wards Act, 1890](#) - Sections 3, 4 and 9; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 9-A

Appeal No. : Interim Petition No. 2 of 1999 in Custody Petition No. 1 of 1999 along with Interim Petition No. 4 o

Appellant : Asra Shakeel

Respondent : Shakeel Suleman

Advocate for Def. : Mahendra Shah i/by ;K.V. Aiyer & ;Associates, Adv.

Advocate for Pet/Ap. : Muchhala and ;R.A. Dadi i/by ;S. Mohammedbhai & Co., Adv.

Judgement :

ORDER

F.I. REBELLO, J.

1. The respondent at the hearing of the petition has raised a preliminary objection that this Court has no jurisdiction to grant any relief as no part of the cause of action has arisen within the territorial jurisdiction of this Court. It is, therefore, contended that the petition which is filed invoking Clause 17 of the Letters Patent of this Court read with section 3 of the Guardians & Wards Act, 1890 is not maintainable.

2. Brief narration of facts may be necessary to decide the controversy.

The petitioner married respondent on 24th January, 1987. Out of this wedlock a son named as Faraz was born on 22nd October, 1987. On 3rd November, 1998 the petitioner left Madurai taking along with her the minor son Faraz who was then schooling at Vikasa School at Madurai in Standard VI. The petitioner while leaving left a note. Only the material part of the note in so far as the present issue is concerned will be referred to. The sum and substance in the note is that the petitioner informed the respondent that she is leaving the matrimonial home. On 27th November, 1998 the petitioner and minor son arrived at Hyderabad. In January, 1999 petitioner arrived at Mumbai with Faraz. The custody petition was filed on 15th January, 1999. In the petition in paragraph 9 it is averred that the petitioner is in Mumbai since January, 1999. It is then averred that the minor child would be admitted in Green Lawns School in Mumbai in VIIIth Standard in new term commencing March, 1999. In paragraph 18 it is averred that the petitioner and the minor child Faraz are in Mumbai and intend to make Mumbai their permanent residence.

3. On behalf of the respondent his learned Counsel has referred to section 9 of the Guardians and Ward Act, 1890, hereinafter referred to 'the Guardians Act'. In terms of section 9(1) if the application is in 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. Learned Counsel tries to point out that therefore for a Court to have jurisdiction it is only that Court where the minor ordinarily resides which would have jurisdiction. Sub-section (4) of section 4 of the Guardians Act defines District Court to include a High Court in the exercise of its Ordinary Original Civil Jurisdiction. It is pointed out by the learned Counsel that

right from the date of marriage i.e. 27th January, 1987 till the petitioner left her matrimonial home along with the minor, the ordinary residence of the minor was at Madurai. In that context it is pointed out that merely because the petitioner has left with the minor and temporarily brought the minor to Mumbai would not mean that the ordinary residence of the minor is at Mumbai. Learned Counsel has relied on several authorities which I will advert to later on.

On behalf of the petitioner her learned Counsel has contended that if the averments at paragraph 18 are perused, then it is clear that the petitioner has left the matrimonial home for good with the intention of setting up a permanent residence in Mumbai. The minor child is with the petitioner. It is then pointed out that if Clause 17 of the Letters Patent of this Court is considered read with section 3 of the Guardians Act, it is this Court which will have jurisdiction to hear and decide this matter. It is also pointed out that the question is a mixed question of fact and law which this Court should not decide at this stage but defer its decision on merits. It is next contended that at any rate even while considering the petition on the issue of jurisdiction what the Court must consider is the interest of the minor child. Learned Counsel has relied on various judgments in support of his contention. The same will be adverted to while deciding the issue in controversy.

4. In so far as the issue pertaining to jurisdiction is concerned and whether it can be decided at this stage will be dealt with first. The respondent has not filed his reply in so far as the main petition is concerned. We are at the stage of the interim petition moved in the main custody petition. In the instant case the petitioner has set out in paragraph 18 that she has left her matrimonial home at Madurai for good, with the intent to settle in Mumbai. This will be a question of fact which will have to be decided on evidence being produced. In the words, the issue is a mixed question of fact and law. However, even at the interim stage based on the pleadings of the parties for the purpose of deciding the interim petition it will be necessary to give a finding as to whether prima facie this Court has jurisdiction to hear, entertain and decide the main petition as well as interim petition. No application as contemplated by section 9-A of the Code of Civil Procedure has been filed.

5. Having said so, I will now proceed to dispose of the contentions based on the pleadings. Section 3 of the Guardians Act reads as under :-

'This Act shall be read subject to every enactment heretofore or hereafter passed relating to any Court of Wards by [any competent Legislature, authority or person in [Any State to which this Act extends]: and nothing in this Act shall be construed to effect or in any way derogate from, the jurisdiction or authority of any Court of wards, or to take away any power possessed by [any High Court].'

Clause 17 of the amended Letters Patent of this Court reads as under :-

'And we do further ordain that the said High Court of Judicature at Bombay shall have the like power and authority with respect to the persons and estate of infants, idiots and lunatics, within the Bombay Presidency, as that which was vested in the said High Court immediately before the publication of these presents.'

A co-joint reading therefore of section 3 of the Guardians Act and Clause 17 of the Letters Patent of this Court would make it clear that whatever powers were vested in the High Court before the amended Letters Patent would be vested in the High Court in terms of the present Letters Patent. It will therefore be important to consider as in what manner this will have effect on section 9 of the Guardians Act which contemplates that for the Court to have a jurisdiction under the provisions of the Guardians Act what must be considered is the ordinary residence of the minor. To this there should be a rider namely whether Clause 17 of the Letters Patent would in any manner read down what is required by section 9 of Guardians Act. To my mind at this stage I need not elaborately deal with the question as based on the decided judgments the issue prima facie can be decided at this stage.

I, therefore, first propose to consider the judgments referred to on behalf of the respondent. For that purpose, learned Counsel has relied on the judgment of a learned Single Judge of this Court in re: Dr. Giovanni Marco Muzzu and etc. etc., reported in A.I.R. 1983 Bom 242. In that case petition had been filed for appointment of a guardian before this Court invoking Clause 17 of the Letters Patent and section 3 of the Guardians and Wards Act. The children in respect of whom orders for appointment of guardian were sought were not from the State of

Maharashtra. They were brought in for the sole purpose of being sent for adoption in a Foreign Country. It is in that context that a learned Single Judge of this Court observed as under:-

'Now what are the facts and circumstances in the present matters. Indisputably the minors were brought from various States to Bombay, not with the intention that Bombay should be their permanent home or for their rehabilitation in the State of Maharashtra. Indisputably, they were brought to Bombay for one solitary purpose, namely, to send them abroad in foreign adoption and that too within the shortest time possible.'

It is in that context that the learned Single Judge observed that the residence of these minors in Bombay cannot be comparable with their being ordinarily resident here and that they do not cease to ordinarily reside in the States from where they were transported merely by reason of their manipulated presence and transient stay in Bombay. From the said judgment what may be culled down is that if the residence in Bombay is merely transient and not with the purpose of permanent residence then it cannot be said that they would be ordinarily residents in Bombay. Next judgment relied on is of a Division Bench of the Kerala High Court in 'he case of Sarada Nayar v. Vayankara Amma and others, : AIR1957 Ker158 . The brief facts and dates of the said judgment may be necessary to discuss as to what is the ratio of the said judgment. A Division Bench of the Kerala High Court was also considering the issue as to what is the meaning of expression of 'Where the minor ordinarily resides'. In that case the petitioner a widow filed a petition in the Trichur District Court on 12th October, 1954. The minor child was at that time in Mumbai in the custody of relatives of her deceased husband. It was contended that as the child was residing at Mumbai the Court at Trichur would have no jurisdiction. The admitted facts on record were that the marital home of the petitioner and her late husband was at Kannambra House in Trichur. The father had his own ideas as to how the child should be brought up. The father was also ailing. In these circumstances, the child was admitted in a school at Trichur. The father was held to have temporarily resided at Madras but that temporary residence came to an end with his death on 27th September, 1954. Even during this period the minor Nirmala was at Trichur. The child was taken away from Trichur to Bombay only

after 13th October, 1954. The petition as already pointed out for guardianship was filed on 12th October, 1954. The contention on behalf of the relatives of the deceased husband of the petitioner therein was rejected by holding that on fact the residence of the minor was at Trichur and merely because the minor was taken for some time outside Trichur would not mean that the minor was ordinarily resident at Bombay. On the contrary the residence would be at Trichur. This was a widow's petition whether the widow on the death of the husband was entitled to guardianship as natural and/or legal guardian of the minor. The third judgment cited is of a learned Single Judge of the Orissa High Court in the case of Konduparthi Venkateswarlu and others v. Tamavarapu Viroja Nandan and others, : AIR1989 Ori151 . In that case also the petition was by the father of the minor against the parents of his deceased wife who were in custody of the minor child. The petitioner was a permanent resident of Berhampur in the District of Ganjam. He had married the daughter of Appellant No. 2 on 8th April, 1979. On 21st May, 1986 the wife of respondent No. 1 fell ill and in these circumstances the wife and child were taken to the father-in-law's house at Visakhapatnam. The wife died there and the minor child who had accompanied mother remained at Visakhapatnam. In these circumstances the Court was called upon to decide the issue of jurisdiction. The learned Single Judge of the Orissa High Court on those facts held that the ordinary residence of the minor was at Berhampur and merely because the child was taken for some time to Visakhapatnam, that would not become the ordinary residence of the minor. All that can be said from these judgments is that the issue as to whether what is the ordinary residence has to be decided on the facts of each case.

6. With the above background reference may now be made to the judgments cited on behalf of the petitioners. Reliance was placed on the judgment of the Special Bench of this Court in the case of re. Ratanji Ramaji, reported in A.I.R. 1941 Bom 397. That was the case where a Special Bench of this Court was considering Clause 17 of the Letters Patent of this Court and the jurisdiction of this Court over minors. The Court formulated three questions. We are in the present case concerned with the first and second questions which are whether the Court under its Ordinary Original Jurisdiction has power to make an order in the case of a minor residing within the limits of the original jurisdiction of this Court, that is to

say, the Town and Island of Bombay Secondly, if it has, does the jurisdiction extend to a minor resident in the Bombay Presidency, outside the Town and Island of Bombay The Court, however, made it clear that it was not expressing any opinion as to what would be the position if the minors were resident outside the Presidency of Bombay. The Court while considering the import of Clause 17 observed as under :-

'I have no doubt that the power which this Court exercises over minors is the power derived from the prerogative of the Crown as *parents patria* to protect subjects of the Crown who can not protect themselves: and if that be the nature of the Court's jurisdiction, it is clear that it can only be limited as to subjects within the jurisdiction of the Court by the interest of the person to be protected.'

Thereafter the Court proceeded to observe as under :-

'On the authorities and on principle, I see no reason to doubt that this Court can make an order, such as is asked for in this case, in respect of minors situate within the limits of the Ordinary Original Jurisdiction of this Court.'

Thereafter the Court proceeded to examine the second contention. While so considering, the Court considered Clause 17 of the amended Letters Patent of 1865 and Clause 16 of the Letters Patent of 1862 which conferred upon the High Court a more extensive jurisdiction than which the Supreme Court had possessed, because both those clauses referred to minors within the Presidency of Bombay, and the only way in which on that hypothesis effect could be given to those words would be by holding that the Letters Patent conferred upon the High Court powers over infants, idiots, and lunatics within the Presidency of Bombay similar to those exercised by the Supreme Court within the town and Island of Bombay. The Court then referred to Clause 37 of the Supreme Court Charter of 1823, whereby the Supreme Court of Judicature at Bombay was authorized to appoint guardians and keepers for infants and their estates, according to the order and course observed in that portion of Great Britain called England. Thereafter, the Court observed that it is clear that clause imposes no territorial limitation. Proceeding further, the Court then observed as under:-

'The reference to the jurisdiction exercised in England seems to me to show that the jurisdiction, which it was intended to confer on the Supreme Court, was jurisdiction to exercise the powers of the Crown as parents patria, those powers being exercised in England at first by the Lord Chancellor, afterwards by the Court of Chancery, and at the present time by the Judges of the Chancery Division.'

Then the learned Chief Justice proceeded to observe as under:-

'The powers now existing under the Amended Letters Patent, in my opinion, extend to persons under disability wherever in the Presidency they may be found, provided they are subjects of the British Crown.'

There was also a concurring judgment by Kania, J.

My next attention was invited to the judgment of Lord Chancellor, Lord Cranworth in the case of Hope v. Hope, reported in 43 E.R. 534. That was for the purpose of pointing out as to what were the powers of the Lord Chancellor in respect of minors. It was observed therein as under :-

'The jurisdiction of this Court, which is entrusted to the holder of the Great Seal as the representative of the Crown with regard to the custody of infants rests upon this ground, that it is the interest of the State and of the Sovereign that children should be properly brought up and educated: and according to the principle of our law, the Sovereign, as parens patriae, is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects.'

There are various other observations which presently I need not advert to. Another judgment in so far as the jurisdiction is concerned, which was referred to was the judgment of the learned Single Judge of the Madras High Court in the matter of A.T. Vasudevan and others v. A.S. Thiruvengada Mudaliar, A.I.R. 1949 Mad 260. The Madras High Court was also considering Clause 17 of its Letters Patent which is taken to Clause 17 of the Letters Patent of this Court. The learned Single Judge observed as under :-

'The jurisdiction was exercised in England by the Chancellor in the Court of Chancery as a part of the general delegation of the authority of the Crown virtue officii. As it has been laid down in a series of cases in England, the Chancellor jurisdiction has its foundation in the prerogative of the Crown flowing from its general power and duty as parents patria.'

Reliance is also placed on the judgment of a Division Bench of the Allahabad High Court in the case of Ram Sarup v. Chimman Lal and others, : AIR1952 All79 . In that case the father of the minor ordinarily resided in Chandausi. There was a dispute between parents, pursuant to which she left the matrimonial home along with the children and she presented application for appointment of a guardian to the Court of District Judge, Moradabad. The father earlier had also filed an application. As there were two applications, the matter was referred by the District Judge to the Allahabad High Court. The question again before the Court was in appointing the guardian was to consider the question as to where the minor ordinarily reside. The Court found that the children are very young and they had been living with their mother. Until the mother left Chandausi in Moradabad District that was their ordinary place of residence. The Court however held that after they have left Chandausi and were living with the mother at Allahabad the inevitable conclusion would be that the ordinary place of residence is at the moment Hathras and in that context the Court observed as under:-

'When a person leaves his place, where he has been residing as a permanent resident, for good, i.e. with no intention to come back to it and goes to some other place to live there, the former place where he used to live ceases to be his ordinary place of residence. The latter place becomes his ordinary place of residence. The question of residence is largely a question of intention. In the case of minors, no question of intentions arise. But the Court will take into consideration their actual place of residence at the time of the application and regard that as their ordinary place of residence.'

7. Reference was also made to the judgment of the Apex Court in the case of Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, : [1983]1SCR49 to contend that the Court while considering the application must primarily consider

the interest of the minor. Reference was also made to the judgment in the case of *Dhanwanti Joshi v. Madhav Unde*, : (1998)1SCC112 with reference to the Hague Convention on Civil Aspects of International Child Abduction where non-Convention countries are concerned. For the present according to me I need not go into aspects of the matter.

Learned Counsel for the petitioner has invited me to go through this Court's, order (Kochar, J.) dated 17th February, 1999 which was an interim Petition by the father for custody of the child. The record shows that the learned Judge had interviewed child. From the order, at that stage what is clear is that the child had expressed his desire to stay with the mother.

8. Taking into consideration all these facts and more so considering the law as expanded by this Court in the case of *Ratanji Ramaji* (supra) and the judgment of the Division Bench of the Allahabad High Court in the case of *Ram Sarup* (supra) to my mind it is clear that at this prima facie stage considering the averments in paragraph 18 of the petition, this Court will have jurisdiction to hear and decide the guardianship petition and consequently application for interim relief. I may mention that the judgment of the Special Bench as also the judgment of the Allahabad High Court was considered by the learned Single Judge in the case of *Dr. Giovanni Marco Muzzu* (supra). However, as I have pointed out in so far as that judgment is concerned, it will depend upon the fact as to whether the mother intended to permanently leave the matrimonial home and set up residence in Bombay. In that case the question as to what is the ordinary residence of the minor will have to be answered considering the law laid down by the various judgments.

9. Having said so, I am of the considered opinion that this Court at this prima facie stage has jurisdiction and consequently the preliminary objection raised on behalf of the respondent is rejected.

10. Liberty to the parties to move the Vacation Judge in case of any urgent reliefs.