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**Smt. Vimla Devi Vs. Smt. Maya Devi and ors.**

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**SooperKanoon Citation** : sooperkanoon.com/753030

**Court** : Rajasthan

**Decided On :** Dec-18-1980

**Reported in** : AIR1981Raj211; 1980()WLN608

**Judge** : S.K. Mal Lodha, J.

**Acts** : Guardians and Wards Act, 1890 - Sections 9

**Appeal No.** : Civil Misc. Appeal No. 98 of 1978

**Appellant** : Smt. Vimla Devi

**Respondent** : Smt. Maya Devi and ors.

**Advocate for Def.** : J.L. Purohit, Adv.

**Advocate for Pet/Ap.** : B.R. Arora, Adv.

**Disposition** : Appeal dismissed

**Judgement** :

**S.K. Mal Lodha, J.**

1. This appeal under Section 47(b) of the Guardians and Wards Act (No. VIII of 1890) (for short 'the Act' hereafter) is directed against the order datedOctober 4, 1978 of the learned District Judge, Bhilwara, by which, he directed return of the application under Sections 10 and 25 of the Act to the appellant, which was filed

on January 3, 1975.

2. The case of the appellant is that she moved an application under Sections 10 and 25 of the Act on January 3, 1975 before the learned District Judge, Bhilwara that she may be appointed guardian of the person and property of Sushree Meena, who is the minor daughter of her son late Sushil Kumar and that she may be returned to her custody from Smt. Maya Devi (respondent No. 1). It has been stated that Shri Sushil Kumar and Smt. Maya Devi were married on July 15, 1972. Out of this wedlock, Sushree Meena was born on April 20, 1973. It is said that when Sushree Meena was only one month old, Smt. Mayadevi left her matrimonial home and went to her parents' house at Bandikui. The relations between Sushilkumar and Smt. Maya Devi from the very inception of the marriage were unhappy. It has further been stated that after Smt. Maya Devi had left her matrimonial home, Shri Sushil Kumar committed suicide by drowning himself into a well on June 25, 1973. Thereafter, on July 16, 1974, Smt. Maya Devi contracted the second marriage with one Rajni Kant Pant at Jaipur and started living with him at Jaipur. It had also been stated that after contracting the second marriage Sushree Meena was left with Virendra Kumar (maternal uncle), Kapil Dev Vashist (maternal grand-father) and Smt. Sushila (wife of maternal uncle of Shri Virendra Kumar) (respondents Nos. 2, 3 and 4 respectively in this appeal). Shri Sushil Kumar was employed in the service as Assistant Engineer, Public Works Department (B. & R.), Government of Rajasthan and had left the Provident Fund amount, arrears of salary and gratuity, all amounting to Rupees 10,000/-, which were in deposit with the Public Works Department (B. & R.) at Bhilwara. The appellant, who is the grand mother of Sushree Meena, filed the application as aforesaid for the appointment of Guardian in respect of person and property of the minor Sushree Meena and for return of her custody as aforesaid.

3. In para 14 of the application, it was stated that Sushree Meena was resident of Bhilwara and the property which she is to get is also at Bhilwara and, therefore, the District Judge at Bhilwara has jurisdiction to entertain and decide the application for the appointment of the guardian of person and property of Sushree Meena.

4. A reply contesting the application was filed on April 19, 1975, which is signed by respondents Nos. 1, 3 and 4 and the learned District Judge, as is clear from para 10 of the impugned order, took this reply on behalf of respondent No. 3 only. The application was contested on several grounds, which need not be stated here. Suffice it to state that in para 14 of the reply, it was stated that the Court at Bhilwara has no jurisdiction to hear the petition. In para 4 of the additional pleas in the reply, it was also stated that all the amount of Shri Sushil Kumar is in deposit at Jaipur and that Sushree Meena lives with her mother Smt. Mayadevi at Jaipur and, therefore, the Court at Bhilwara has no jurisdiction to entertain the petition.

5. On the basis of the pleadings of the parties, 5 issues inclusive of the relief were framed by the learned District Judge. In this appeal, I am only concerned with issue No. 2, which when translated into English reads as under:

'2. Whether the application is not triable by the Court?'

In support of the application, the statement of Smt. Vimla Devi (appellant) as P. W. 1 was recorded, In rebuttal, Virendra Kumar (R. W. 1) (respondent No. 2) was examined. By the impugned order dated October 4, 1978, the learned District Judge decided issue No. 2 against the appellant and in favour of the respondents holding that the District Judge at Bhilwara has no jurisdiction to hear the application. In this view of the matter, it was directed that it would be proper to return the application filed by the appellant for presentation to a proper Court. It may be mentioned here that in the impugned order, certain other directions were given, with which I am not concerned in this appeal. Aggrieved by the order dated October 4, 1978 passed by the learned District Judge, the appellant has filed this appeal.

6. I have heard Mr. B. R. Arora, learned counsel for the appellant and Mr. J. L. Purohit, learned counsel for the respondents.

7. It was contended by Mr. Arora, learned counsel for the appellant that the learned District Judge has committed a serious error when he held that the District Judge at Bhilwara has no jurisdiction to hear the application filed by the appellant inasmuch as the minor Sushree Meena will be deemed ordinarily to reside at

Bhilwara where her father Sushilkumar, who was the natural guardian, resided at the time of her removal by her mother Smt. Maya Devi and further that the property which Sushree Meena is to get in regard to which, the appellant has made application for appointment of guardian is also at Bhilwara. In support of his submission, he invited my attention to Nazir Begum v. Ghula Qadir Khan, AIR 1937 Lah 797; Mst. Nazir Begum v. Ghulam Qadir, AIR 1938 Lah 313, Lalita Twalf v. Paramatma Prasad, AIR 1940 All 329, Vimlabai v. Baburao, AIR 1951 Nag 179, Bhola Nath v. Sharda Devi, AIR 1954 Pat 489, Jhala Harpalsingh v. Arunkunvar, AIR 1954 Sau 13, Chandra Kishore v. Hemlata, AIR 1955 All 611, Sarada Nayar v. Yayankara Amma, AIR 1957 Ker 158, Narinder Singh v. General Public, (1968) 70 Pun LR 221 and Smt. Kamlesh v. Shri Ram Paul, (1971) 73 Pun LR 221.

8. On the other hand, Mr. Purohit, learned counsel for the respondents supported the impugned order for the reasons mentioned by the learned District Judge and referred to Ram Sarup v. Chimman Lal, AIR 1952 All 79, Smt. Kamla v. Bhanu Mal, AIR 1956 All 328, Keshawanand v. Afroza Begum, AIR 1958 Raj 221, Harbans Singh v. Vidya Wanti, AIR 1960 Punj 372, Jamuna Prasad v. Mst. Panna, AIR 1960 All 285, Firoza Begum v. Akhtaruddin Laskar, AIR 1963 Assam 193, Virbala v. S. Harichand, AIR 1973 Guj 1, Harichand v. Virbala, AIR 1975 Guj 150 and Tilak Raj Kapoor v. Smt. Asha Kapoor, 1978 Raj LW 458 : (AIR 1979 Raj 128).

9. I have bestowed my most anxious and careful consideration to the rival contentions raised by the learned counsel for the parties.

10. It would be pertinent here to first notice the relevant provisions of the Act which have bearing on the question to which I am called upon to decide.

11. Section 4(5) of the Act defines 'the Court'. Sub-clause (ii) of Clause (b) of Sub-section (5) of Section 4 reads as follows :

'(ii) in any matter relating to the person of the ward, the District Court having jurisdiction in the place where the ward for the time being ordinarily resides; or'

Section 9 relates to the jurisdiction of the Court to entertain an application. It is reproduced in extenso :

'9. (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 properly 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.'

Section 25(1) amongst others provides that if a ward is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of the guardian, may make an order for his return. An analysis of Section 9 shows, (i) that if an application is for the guardianship for the person of the minor, it is required to be made to the District Court having jurisdiction in the place where the minor 'ordinarily resides'; (ii) if the application is with respect to the guardianship of the property of the minor, it can be made, (a) either to the District Court having jurisdiction in the place where the minor 'ordinarily resides', or (b) to a District Court having jurisdiction in a place where he has properly; and (iii) if an application is made with respect to the guardianship of the property of a minor to a District Court other than that having jurisdiction in the place where the minor 'ordinarily resides', the Court has been empowered to return the application if in its opinion that application can be disposed of more justly or conveniently by any other District Court having jurisdiction. Thus, it follows from Section 9 of the Act that if a composite application for the guardianship of the person and property of the minor is made, it may be made to the District Court having jurisdiction in the place where the minor

ordinarily resides. This is the case before me as a composite application for the guardianship of the person and property of the minor was moved before the District Judge, Bhilwara stating that the minor ordinarily resides within the jurisdiction of the District Court, Bhilwara and where he has property also. As a matter of fact, as is clear from the impugned order of the learned District Judge that on behalf of the appellant, it was submitted that as the minor (Sushree Meena) ordinarily resided at the time of the presentation of the application within the jurisdiction of the District Court, Bhilwara, that Court has jurisdiction to hear the application. It has not rightly been disputed that a question whether or not a minor ordinarily resides within the jurisdiction of the Court has to be decided on the facts and circumstances of each case. This has necessitated the examination of thequestion whether the minor Sushree Meeoa will be deemed to have ordinarily resided at Bhilwara within the jurisdiction of the District Court, Bhilwara from where Smt. Maya Devi (respondent No. 1) removed her from the custody of her natural guardian Sushil Kumar.

12. In Ram Sarup's case (AIR 1952 All 79), a Division Bench of the Allahabad High Court held that the place of resident of the minors at the lime of application should be held to be the place where they resided with their mother.

13. A learned single Judge of the Allahabad High Court in Smt. Kamla s case (AIR 1956 All 328) had occasion to consider the words 'Ordinarily resides' as used in Section 9 of the Act. It was observed as follows (at p. 330)

'The past abode, for however long a period it may be, cannot be considered to be the place where the minors are residing. The words used are in the present tense i.e., where the minor ordinarily resides.' In that case, the view taken by the learned Judges in Lakshman v. Ganga Ram, AIR 1932 Bom 592 was dissented from and after following the observations made in Ram Sarup's case (AIR 1952 All 79) and noticing Smt Vimla Bai's case (AIR 1951 Nag 179), the learned Judge reached the conclusion that as the mother is actually residing at Roorkee and, therefore, her children would also be deemed to be residing at Roorkee.

14. The same learned single Judge again explained the expression 'ordinarily resides' as used in Section 9 of the Act in Jatnuna Prasad's case (AIR 1960 All

285). He, inter alia, noticed Vimlabai's caw (AIR 1951 Nag 179), Ram Sarup's case (AIR 1952 All 79), Chandra Kishore's case (AIR 1955 All 611) and Smt. Kamla's case (AIR 1956 All 328) and observed as under (at p. 288 of AIR 1960 All):

'In my opinion the words 'ordinarily resides' 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 tune of the application' may in some cases amount to rendering nugatory all the provisions of the Guardians and Wards Act It may be that persons who have absolutely no right may remove the minor forcibly and keep him at a distant place, when the application is made, where the minor was ordinarily residing, and objection may be taken that the application was not entertainable. In that event, the residence may depend on the machinations of recalcitrant persons. It may be that in the Bombay case on the facts the Bench had come to the conclusion that the place where he was residing at the time of the application, was the place, where he was ordinarily residing. But it cannot be held as a proposition of law that it will always be the same.'

15. In Harbans Singh's case (AIR 1960 Punj 372) a learned single Judge of the Punjab High Court took the view that where for the purpose of the minor being better looked after, his mother sent him to her real brother at C, where he was put into a school and where he was being properly looked after by the maternal uncle of the minor, he should be considered to be ordinarily residing at C. In that case, Mt. Nazir Begam's case (AIR 1938 Lah 313) was distinguished.

16. A Division Bench of the Assam High Court in Firoza Begum's case (AIR 1963 Assam 193) considered the expression 'ordinarily resides' as used in Section 9 of the Act. It noticed Jhala Harpalsingh's case (AIR 1954 Sau 13), Sardar Nayar's case (AIR 1957 Ker 158) and Chandra Kishore's case (AIR 1955 All 611). In that case, the father of minor children made an application for his appointment as guardian on March 21, 1960 before the Additional District Judge, Gauhati. Some months later i.e., on December 11, 1961 the mother made a similar application for

her appointment as the guardian before the District Judge, Silchar. The minors had left with their mother to Silchar in the year 1957, and bad been living with their mother ever since in Silchar. Thus they had been residing at Silchar, for a period of about three years prior to the making of the application. In those facts, it was held that both under law and also in the interests of the minors, the proceedings for the appointment of a guardian of their person should go on in the District Court at Silchar and the proceedings at District Court, Gauhati, should be transferred to the District Court, Silchar, for the further progress and disposal of the matter.

17. In Virbala's case (AIR 1973 Guj 1) two minor children were residing with their mother since the time she left her husband's home and went to reside with her parents at Vaghel in Mebsana District and the thud child was born thereafter and all the three children were still residing there for over a period of two years when the husband filed his petition for their custody in Palampur District Court within whose jurisdiction he resided. In those facts, it was held that taking into consideration all the relevant circumstances, the minors were ordinarily residing in Vaghel and that, therefore, the Palanpur District Court had no jurisdiction to entertain the application.

18. Bearing in mind, the principles laid down in the decisions of the Allahabad High Court, Assam High Court, Gujarat High Court and the Punjab High Court, let me advert to the facts regarding which there is no dispute.

19. Sushree Meena was born on April 20, 1973. When she was one month old, her mother Smt. Mayadevi removed her from the custody of her natural guardian Sushil Kumar (father). Sushil Kumar committed suicide by drowning himself into a well on June 25, 1973. The application for the appointment of the guardian in respect of person and property of the minor Sushree Meena was filed on January 3, 1975. After Smt. Mayadevi had left her matrimonial home with her daughter Sushree Meena, Sushree Meena had not returned to Bhilwara in between the date of her removal and the date of filing of the application on January 3, 1975. The case of the appellant is that Smt. Maya Devi contracted the second marriage on July 16, 1974 and since then, she has been living with her husband Rajni Kant Pant at Jaipur and that she had left Sushree Meena with her brother at Bandikui.

Be that as it may, it is dear that since Smt. Maya Devi removed her daughter Sushree Meena from her matrimonial home at Bhilwara, when she was one month old and up to the date of the presentation of the application on January 3, 1975, neither Smt. Maya Devi nor Susbree Meena had ever come and resided at Bhilwara. Having considered the circumstances that Sushree Meena has not been residing within the jurisdiction of the District Court, Bhilwara ever since she was removed by her mother and further that she was neither brought nor did she return to Bhilwara for over a period of about 18 months and that ever since her removal, she has been looked after and brought up by her mother and her relatives, she cannot be considered to have ordinarily resided within the meaning of Section 9 of the Act at Bhilwara on the date of the presentation of the application. Taking all the relevant circumstances into consideration and the aforesaid facts about which there in no dispute, I am firmly of the opinion that the minor Sushree Meena ordinarily did not reside at Bhilwara on the date when the application for the guardianship of the person and property was filed by the appellant in the Court of District Judge, Bhilwara. In coming to this conclusion, I stand fortified from the decisions, reference of which has been made herein-above. In this view of the matter, it is not necessary for me to examine the various authorities cited by Mr. Arora, learned counsel for the appellant, for, most of them have already been noticed in the various decisions which I have considered above. As learned counsel for the appellant in particular read Chandra Ktshore's case (AIR 1955 All 611); Jhala Harpalsingh's case (AIR 1954 Sau 13); Sarada Nayar's case (AIR 1957 Ker 158); Narinder Singh's case, ((1968) 70 Pun LR 221) and Smt. Kamlesh's case, (1971) 73 Pun LR 221, I consider it proper to say a few words about these authorities.

20. In Jhala Harpalsingh's case, (AIR 1954 Sau 13), it was held that mere factual residence at a place at the time of the proceeding is not sufficient to give jurisdiction and the words used in Section 4(5)(b)(ii) are not simply where the minor resides but where the minor ordinarily resides and that the word 'ordinarily' has been intentionally used to bring in considerations other than that of mere factual residence.

21. In Chandra Kishore's case, (AIR 1955 All 611), it was observed that the words 'ordinarily resides' obviously mean more than temporary residence, even though such residence is spread over a long period.

22. What was held in Sarada Nayar's case (AIR 1957 Ker 158) was that the expression 'where the minor ordinarily resides' appears to have been deliberately used in Section 4(5)(b)(ii), to exclude places to which the minor may be removed at or about the time of the filing of the application for the enforcement of the guardianship and custody of the minor and the phrase 'ordinarily resides' indicates ordinary residence even at the time of the presentation of the application under Section 25 of the Act and that the emphasis is undoubtedly on the minor's ordinary place of residence.

23. For coming to the conclusion regarding ordinary residence of the minor at the time of the presentation of the application for guardianship under Section 9 of the Act, the entire facts and circumstances of each case have to be taken into consideration and on the facts and in the circumstances of this case, to which I have referred above, while agreeing with the learned District Judge, Bhilwara, I have come to the conclusion that Sushree Meena cannot be deemed to have ordinarily resided at Bhilwara within the meaning of Section 9 of the Act on the date of the presentation of the application.

24. So far as Narinder Singh's case ((1968) 70 Pun LR 221) is concerned, that was a reference under Sub-section (2) of Section 14 of the Act by the Senior Subordinate Judge, Ambala. On the facts and in the circumstances of that case, it was held that for determining which of the two Courts should decide the application filed under Section 10 of the Act, the convenience and the interest of the minor subject to statutory restrictions, should be taken into consideration and that the Court of the place where the minor is never to go to reside should not be selected for the decision of the application. In that case, the views expressed by Bhargava, J. in Smt. Kamala's case, (AIR 1956 All 328) were followed and it was further observed as follows:

'The main consideration being the convenience and interest of the minor subject to the statutory restrictions already referred to, and the minor being no more in

Ambala and no part of her property being in that district, there seems to be no reason whatever to prefer Ambala Court to Jullundur Court.' The decision does not support the contention raised by the learned counsel for the appellant.

25. The only authority that remains to be considered is Smt. Kamlesh's case, ((1971) 73 Pun LR 221). That was a case under Section 6 of the Hindu Minority and Guardianship Act (No. XXXII of 1956). In that case, it was held amongst others that where the application is filed shortly after the minor is removed, the place where the minor is residing after removal cannot be taken into consideration for the purpose of determining the jurisdiction of the Court which entertained the application as even in such a case the ordinary residence would continue to be the place from where he was removed. In that case, the child was removed in Jan. 1967. Two months later the application was filed. This authority is clearly distinguishable on facts.

26. The upshot of the above discussion is that the learned District Judge was right when he held that he has no jurisdiction to hear the application under Sections 10 and 25 of the Act filed by the appellant, for, the minor Sushree Meena did not ordinarily reside within his jurisdiction at the time of the presentation of the application by the appellant.

27. No other point was pressed by the learned counsel appearing for the parties.

28. The result is that this appeal fails and it is hereby dismissed. In the circumstances of the case, I leave the parties to bear their own costs of this appeal.

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