

IN THE HIGH COURT OF KARNATAKA DHARWAD BENCH

THE HON'BLE MR.JUSTICE SREENIVAS HARISH KUMAR

C.P. NO.100179/2016 DATED:06-10-2017

SHRI.DR. VISHAL KHAKHANDAKI S/ O. DR.SURESH K. VS. SMT.DR. ASHWINI KHAKHANDAKI, W/ O DR.VISHAL KHAKHANDAKI,

ORDER

This is a petition under Section 24 of C.P.C. seeking transfer of Child Custody Proceeding, G. & WC. No.229/2016 from the Court of III Addl. Pr. Judge, Bengaluru, to Family Court, Belagavi.

2. The petitioner is the husband and the respondent is the wife. Their marriage was solemnized on 12.08.2009 as per Hindu rites and L customs at Arya Vysya Abhyudhaya Sangam, Secunderabad. On 26.07.2010, the respondent gave birth to a male baby that was named Vikhyath, and for the custody of this child that the petitioner and the respondent are fighting.

3. The petitioner has stated that after the marriage he side and his wife moved to Chennai for higher learning and in search of better prospects. Thereafter the petitioner took up an employment at Bengaluru, and therefore, they both came to Bengaluru. In the year 2013, the petitioner started his own clinic, Vikyath Eye and Retina Centre taking financial assistance from his parents, who sold their ancestral property and gave the money to the petitioner to the extent of one crore for purchasing the equipments required for the clinic. As the petitioner's family faced financial hardship at Bengaluru, the petitioner and the respondent agreed to move over to Belagavi, the petitioner's native place, for better prospects and in the best interest of the family. The petitioner wound up his medical practice at Bengaluru and moved to Belagavi in the month of May 2016. At that time the petitioner brought his son with the consent of the respondent and got him admitted to a school at Belagavi. The respondent, who had agreed in the beginning to re locate to Belagavi, changed her mind and refused to come over to belagavi. The petitioner has alleged that the respondent developed repulsive attitude and was quarrelling with him on trivial matters. This resulted in disturbing the peaceful atmosphere at home. The respondent, after refusing to come to Belagavi, started living in a PG Hostel and then initiated divorce proceedings at Family Court, Bengaluru. Thereafter, she made a separate petition to obtain the custody of child. The petitioner has sought the transfer of this petition to the Family Court, Belagavi.

4. The respondent has not filed any statement of objections to this petition for transfer. It appears that this Court granted an order of stay of further proceedings in G. & WC. No.229/2016. Seeking to vacate this order, the respondent made an application and in the affidavit filed along with this application, she has alleged that the petitioner and herself were residing in Bengaluru together from November 2012 to May 2016. On 05.05.2016 the petitioner forcibly took away the child and left Bengaluru without informing her. On 09.05.2016, when the petitioner came to Bengaluru, she enquired him about the child and that time he told

that the child was at Belagavi and that he had left Bengaluru to stay permanently at Belagavi. Since the petitioner had taken the child from her custody deceitfully, she made complaint to the police on 10.05.2016. She had stated that the petitioner virtually abducted the child. Having noticed the petitioner's adverse attitude and behaviour towards her from day one after the marriage, she decided that living with such a person would be detrimental to her and child's interest, and therefore, she made a petition for divorce in the month of August 2016 and also initiated another proceeding for obtaining the custody of minor child, in the Family Court at Bengaluru.

5. I have heard the arguments of the petitioner's counsel and also the respondent's counsel.

6. The petitioner's counsel argued that the Court having jurisdiction to decide the custody of the child is the Court at Belagavi. It is the place where the child is presently residing with his father and grandparents. The petitioner has admitted the child to a school at Belagavi. Belagavi is the place where the child resides ordinarily. He referred to Section 9 of the Guardian and Wards Act, 1890 (for brevity, 'the Act') to argue that the B Family Court at Bengaluru has no jurisdiction. He also argued that when the respondent presented the petition for custody of child at Bengaluru, the Court raised objection by making a note in the order sheet that the child was residing at Belagavi with the father. The objection, thus, raised by the Family Court, Bengaluru, clearly shows that the Family Court at Bengaluru had no jurisdiction. Therefore, the said Court should have first decided the jurisdiction aspect. Instead, it directed the respondent in G. & WC. Proceeding i.e., the petitioner herein, to bring the child. The Family Court at Bengaluru should not have proceeded further without deciding the question of jurisdiction, and hence, the petitioner is constrained to present the transfer petition. In support of his argument, he relied upon the following judgments

- i. Ruchi Majoo v. Sanjeev Majoo [(2011) 6 SCC 479]
- ii. Aparna Banerjee v. Tapan Banerjee [AIR 1986 P & H 113]
- iii. Giovanni Marco Muzzu and etc. [AIR 1983 BOM 242]

7. On the other hand, the respondent's counsel argued that no mutual decision was taken for moving over to Belagavi from Bengaluru. The respondent was of the opinion that they would find better career prospects only at Bengaluru and she never agreed to go to Belagavi with her husband. The petitioner and the respondent were living at Bengaluru for about four years and the child was also with them at that time. Therefore, the ordinary place of residence of the child is Bengaluru only and not Belagavi. The Family Court at Bengaluru gave a direction to the petitioner husband to produce the child and this direction was given only for the purpose of coming to conclusion about its jurisdiction. It was not an interim order. He further argued that question of jurisdiction has to be decided by the Family Court at Bengaluru and for that purpose, enquiry needs to be held. Enquiry can be held only by the Court where the custody proceeding is pending and this Court in a transfer petition cannot decide that issue. He submitted that the terminology, ' Ordinarily resides ', is a mixed question

of fact and law and for this reason, as has been held by the Supreme Court in Ruchi Majoo's case, enquiry is very essential, and therefore, this custody proceedings cannot be transferred from Bengaluru to Belagavi.

8. Having heard both the counsel, it becomes amply clear that both the counsel mainly rely upon the judgment of the Supreme Court in Ruchi Majoo's case and the entire case rests on the interpretation of the expression ' Ordinarily resides ', as found in Section 9 of the Act.

9. It is not disputed that the child is now residing with its father at Belagavi. Whether Belagavi can be considered as the ordinary place of residence of the child is the question. The Hon'ble Supreme Court in Ruchi Majoo's case has observed as below:

" It is evident from a bare reading of the above that the solitary test for determining the jurisdiction i of the court under Section 9 of the Act is the ordinary residence ' of the minor. The expression used is " Where the minor ordinarily resides ". Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law capable of being answered without an enquiry into the factual aspects of the controversy. The factual aspects relevant to the question of jurisdiction are not admitted in the instant case. There are serious disputes on those aspects to which we shall presently refer. We may before doing so examine the true purpose of the expression ordinarily resident ' appearing in Section 9 (1) (supra). This expression has been used in different contexts and statutes and has often come up for interpretation. Since liberal interpretation is the first and the foremost rule of interpretation it would be useful to understand the literal meaning of the two words that comprise the expression. The word ordinary ' has been defined by the Black's Law Dictionary as follows: "Ordinary (Adj.): Regular; usual; normal; common; often recurring; according to established order; settled, customary; reasonable; not characterized by peculiar or unusual circumstances; belonging to, exercised by, or characteristic of, the normal or average individual. "

The word 'reside ' has been explained similarly as under:

" Reside: live, dwell, abide, sojourn, stay, remain, lodge. (Western-Knapp Engineering Co. V. Gillbank, C.C.A. Cal., 129 F.2d 135,136.) To settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically, to be in residence, to have an abiding place, to be present as an element, to inhere as quality, to be vested as a right. (State ex rel. Bowden v. Jensen Mo., 359 S.W.2d 343,349.) "

In Webster's dictionary also the word 'reside ' finds a similar meaning, which may be gainfully extracted:

" 1. To dwell for a considerable time; to make one's home; live.

2. To exist as an attribute or quality with in. 3. To be vested: with in "

10. In the same judgment, reference is made to another judgment in the case of Kuldip Nayar & Ors. v. Union of India [2006 (7) SCC 1], to gather the meaning of 'ordinary residence '. It is as below:

"243. Lexicon refers to Cicutti v. Suffolk County Sep Council (1980) 3 All ER 689 to denote that the word " ordinarily " is primarily directed not to duration but to purpose. In this sense the question is not so much where the person is to be found " ordinarily ", in the sense of usually or habitually and with some degree of continuity, but whether the quality of residence is " ordinary " and general, rather than merely for some special or limited purpose.

244. The words " ordinarily " and " resident " have been used together in other statutory provisions as well and as per Law Lexicon they have been construed as not to require that the person should be one who is always resident or carries on business in the particular place. "

11. In the light of the judgment of the Supreme Court as referred to above, if the meaning of expression ' Ordinarily resides ', can be expanded, it can be said that it does not connote past residence. Ordinarily, an adverb qualifying the verb ' resides ' takes its natural and common meaning that one should be resident of a particular place with an intention to live there for a certain number of years, though not permanently, in connection with one's ' occupation or employment. In the case of a school going child, its ordinary place of residence is that place where it goes to school and lives with its parents. But this meaning cannot be fastened if the child is studying in a boarding school, its ordinary place of residence in such a situation is the place where its parents reside. Residence connotes living in one's ' house, whether own or rented. If one lives at a place, it obviously implies a meaning that there must be an intention to live at that particular place treating that place as his place of residence, and it may also be in connection with one's ' business, employment, etc. Given this meaning, here the ordinary place of residence of the son of petitioner and respondent is Belagavi only. It is true that in Ruchi Majoo's case, as has been argued by the learned counsel for the respondent, an enquiry has to be held. But the enquiry contemplated here is by the Court where the petition for custody of child is made. Without filing this transfer petition, if the jurisdiction of the Family Court at Bengaluru, is questioned, it can be said that the said Court should have held an enquiry to arrive at a conclusion that whether it has jurisdiction or not. Since this issue has arisen in the transfer petition, this Court can take a decision based on the materials available on record.

12. It is admitted fact that the child is now staying with his father at Belagavi. The petitioner has stated that the respondent is staying in a PG accommodation at Bengaluru. Of course, the respondent has produced a document i.e., copy of the rental agreement dated 21.06.2017 to show that she has taken a house on rent for her residence. Probably, she has produced this document to assert that she is no longer staying in PG accommodation. She has also produced another document, i.e., a certificate of employment to show that she is working at Dental and Orthodontic Clinic, Bengaluru, on a salary of Rs.50,000/per month. But all these documents, especially the rent note are subsequent to her initiating custody proceeding in G. & WC. No.229/2016. From this rent agreement, it can be inferred that on the day she initiated custody proceeding,

probably she might be staying in a PG accommodation as has been stated by the petitioner. Therefore, in these circumstances, it is not possible to hold that the child Vikyath was not ordinarily resident of Bengaluru at the time when the respondent presented a petition for custody of her child.

13. Convenience of the child must also be considered. If the proceedings are permitted to go on at Bengaluru, whenever the Court directs for production of a men child, he has to undertake travel from Belagavi to Bengaluru, which is not practicable and feasible in the interest of the child. So, from these circumstances, I come to the conclusion that Belagavi is the place where Vikyath resides ordinarily and the Court at Belagavi should only decide the issue with regard to custody. From this discussion, the following:

Order

- i. Petition is allowed.
- ii. G. & WC. 229/2016 pending on the file of III Addl.Prl. Judge, Family Court, Bengaluru, is transferred to Family Court, Belgavi, for disposal according to law.
- iii. The III Addl.Prl. Judge, Family Court, Bengaluru, shall transmit the entire records in G. & WC. 229/20016 to the Family Court, Belagavi, forthwith.
- iv. There is no order as to cost.