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203 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR-641 of 2019 (O&M)
Date of Decision: 11.01.2021.

Akshay Gupta

...Petitioner

V/S

Divya & Ors.

....Respondents

CORAM: HON'BLE MR JUSTICE ARUN MONGA

Present : Mr. Akshay Jindal, Advocate
for the petitioner.

Mr. Aman Bansal, Advocate
for the respondents.

(Presence marked through video conference).

ARUN MONGA, J. (ORAL)

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1. Before this Court are parents of their minor daughter "Kyna", currently aged 6 years, litigating over her custody, having separated from each other sometime in October, 2017.

2. The marriage between parties took place on 19.11.2013. Out of wedlock, they were blessed with a daughter on 08.12.2014. Unfortunately their marriage fell on the rocks and under acrimonious circumstances, the respondent-wife moved to her parental house. Though it is alleged by her that she was thrown out of her matrimonial home during the night of 19.10.2017. The case of respondent-wife is that the minor daughter at the time of separation was in her physical custody. Minor was later admitted in Shemrock School, Panipat on 01.11.2017. Mother alleges that on 19.01.2018, daughter Kyna was taken by her father/ petitioner and his family in a deceitful manner from the answering respondent, stating that the grand parents wanted to be with their granddaughter for few days. Instead, the custody of minor daughter was never

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handed back to the mother thereafter. Several meetings and Panchayats were convened but the custody was not restored. On the other hand, allegation of the petitioner/husband is that the respondent-wife has willfully abandoned her matrimonial home and even the custody of minor child has been willfully handed over to the petitioner/father.

3. Be that as it may, aforesaid allegations/counter allegations are not very relevant for the purpose of adjudication qua the issue raised in instant proceedings. The short controversy herein is whether the Family Court at Panipat has the territorial jurisdiction to entertain the petition instituted by the mother/ respondent to seek the custody of her daughter.

4. Instant revision petition is second foray of lis in this Court arising out of proceedings pending before the Family Court, Panipat under Sections 10 and 25 of the Guardian and Wards Act(for brevity, the Act). The earlier round arose out of an order passed by the Family Court vide which interim custody was declined to the respondent-wife, leading to the filing of an appeal before the Division Bench of this Court bearing FAO No. 5724 of 2019.

5. The DB appeal was disposed of on 13.12.2019 with a direction to the Family Court at Panipat to conclude the proceedings expeditiously, preferably within a period of 5 months. It would be apposite to reproduce the relevant extract of the order dated 13.12.2019 passed by the Division Bench, as below:-

“As the matter is still pending before the court below, this court does not find any reason to entertain the present appeal. Same is hereby dismissed. However, at this stage, learned counsel for the appellant has prayed that a direction be issued to the court below to decide the matter expeditiously and the observations made in the order be not taken into consideration. We hereby direct that the Family Court Panipat shall make endeavor to conclude the proceedings expeditiously, preferably within a period of five months. It shall not be swayed by the observations made in the

interlocutory order (sic.) which is under challenge in this appeal.”

6. Pursuant to aforesaid direction of the Division Bench, the Family Court took up the matter and has now kept the same for recording the evidence for its expeditious disposal. It is at this stage, that the petitioner-husband instead of joining the proceedings for evidence before the Family Court, is now instead resisting the same on the ground that the Court at Panipat does not have the territorial jurisdiction.

7. The primary plea taken is that admittedly custody of the minor child is with father/ petitioner and relying on Section 9 of the Act, it is contended that only Family Court where a minor child ‘ordinarily’ resides shall have the territorial jurisdiction. In this case the child is since in physical custody of father/petitioner at Jagadhari/Yamunanagar.

8. In the premise, learned counsel for the petitioner, relying on the judgments in **Shakuntala Vs. Rajesh¹**, **Smt. Aparna Banerjee Vs. Tapan Banerjee²**, **Smt. Sunita Jain & Ors. Vs. Mittar Sain Jain & Anr.³**, **Tejbir Singh Vs. Baljit Kaur⁴**, **Pooja Bahadur Vs. Uday Bahadur⁵** and **Rosy Jacob Vs. Jacob A. Chakramakkal⁶** submits that it is the convenience and welfare of the minor child which is of paramount importance to determine the issue of territorial jurisdiction and not the convenience of the mother/respondent. He contends that in order to avoid unnecessary travelling of the minor child to appear before the Family Court at Panipat, proceedings ought to have been

¹2010(5) RCR(Civil) 261

²1986 AIR(Punjab) 113

³2003(1) RCR(Civil) 440

⁴CR No. 7257 of 2018, decided on 02.11.2018

⁵1999(3) RCR(Civil) 219

⁶1973 AIR(SC) 2090

instituted before the Family Court at Jagadhri where minor child is currently residing with her father.

9. Per contra, learned counsel for respondent-wife submits that it is too late at this stage to raise the issue of territorial jurisdiction.

10. Learned counsel for the respondents submits that when the Division Bench disposed of the aforesaid appeal, at that stage it was neither argued nor pointed out by the petitioner before the Division Bench that Family Court at Panipat cannot conclude the proceedings within a period of 5 months since the issue of jurisdiction of Family Court at Panipat was also still pending before this court by way of the instant petition.

11. Having heard learned counsel for both the parties, I am of the view that there is merit in the arguments addressed by learned counsel for respondent-wife. Petitioner, having once acquiesced to the jurisdiction by not raising the issue of territorial jurisdiction before the Division Bench or not seeking leave to pursue the same or even otherwise also not pointing out that he would be pressing for the same through the instant proceedings, the said issue cannot be raised at this belated stage, as the same would defeat the very purpose of directions issued by Division Bench of this Court, *ibid*.

12. Apart there from, a perusal of Section 6 of Hindu Minorities and Guardians Act, 1956 would reveal that the custody of child below five years would ordinarily lie with mother. It is not in dispute that at the time of separation the custody was with the mother and she was indeed admitted in School at Panipat where she was residing after separation and her age at the time of institution of petition by the wife was 03 years and 07 months. For ready reference, Section 6 (a) of the Act *ibid* is reproduced as under :-

6. Natural guardians of a Hindu minor.—The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

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*(a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
xxx....”*

A bare reading of above denotes that qua a child less than five years, there is a legal presumption with regard to natural guardianship vis a vis “minor’s person” and “minor’s property”, both being in favour of the mother. I am of the opinion that benefit of legal presumption of guardianship would also enure therewith all the other consequential rights arising there from, including the legal presumption qua custody of a minor below five years in favour of his/her mother.

13. I am also persuaded with the view taken by my learned Brother Amol Rattan Singh, J. in Tejbir Singh’s case (supra), holding *“that the custody of a child below 05 years of age (especially a female child), would naturally lie with the mother and therefore the deemed custody would be with the mother even if actual custody was with the father.”*

14. In the aforesaid premise, I have no hesitancy to interpret section 6(a) *ibid* to mean and intend that even though a minor below five years may not be in physical custody/residing with mother, but her/ his custody would be deemed to be at a place where the mother is residing. It is so held accordingly.

15. The respondent/mother herein, at the time of instituting proceedings before the family court, was the deemed natural guardian of the minor child. Therefore, the natural custody would also be presumed to be with mother, regardless of the place where the child was actually residing physically at the that time.

16. It is conceded position that when the petition for custody was filed before Family Court, Panipat, the minor daughter was less than 5 years, being 3 years and 07 months. Accordingly, there is no legal infirmity in the order

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impugned before this Court. The relevant consideration and cut-off date for consideration as to whether Family Court, Panipat had territorial jurisdiction, was the date on which the petition was filed, when admittedly minor daughter was less than 5 years of age. Her mother/ respondent-wife was, therefore, well within her right to invoke territorial jurisdiction of Family Court at Panipat.

17. Having observed aforesaid, I am also in agreement with learned counsel for the petitioner that it is the welfare and convenience of child which is to be seen. Being so, Family Court at Panipat should also keep the same in mind while proceeding further with the custody petition. Accordingly, all possible endeavors shall be made to avoid travelling of minor daughter from Jagadhri to Panipat, by not insisting on her physical presence, unless really essential. Even though, physical hearings have resumed before the trial Courts in the States of Punjab and Haryana pursuant to recent administrative orders passed by this Court, regardless, the Family Court at Panipat shall be at liberty to conduct the proceedings either through video conferencing or through WhatsApp/Zoom video call, depending upon internet connectivity.

18. In the parting, it would not be out of place to observe that nothing stated herein above shall be treated as an expression on merits of the case pending before the Family Court. The same shall be adjudicated on its own merits based on the evidence adduced by the respective parties in accordance with law.

19. Disposed of in above terms.

January 11, 2021
Jiten

(ARUN MONGA)
JUDGE

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Whether speaking/reasoned: Yes/No
Whether reportable: Yes/No