

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 4th OF JANUARY, 2023

MISC. PETITION No. 2147 of 2021

BETWEEN:-

**SMT. KALYANI SARASWAT W/O
GAJENDRA SARASWAT D/O SHRI
PURUSHOTTAM SARASWAT, AGED
ABOUT 31 YEARS, OCCUPATION:
HOUSEHOLD WORK HOUSE OF SHRI
KRISHNA SARASWAT, YELLOW
BUNGLOW (MAHARASHTRA)**

.....PETITIONER

***(BY SHRI MAKBOOL AHMAD MANSOORI, LEARNED COUNSEL
FOR THE PETITIONER).***

AND

- 1. GAJENDRA S/O ROHIT KUMAR JI
SARASWAT, AGED ABOUT 33 YEARS,
OCCUPATION: BUSINESS 180, PALYA
ROAD, NAGDA (MADHYA PRADESH)**
- 2. PURUSHOTTAM SARASWAT S/O SHRI
KRISHNA SARASWAT HOUSE OF SHRI
KRISHNA SARASWAT, YELLOW
BANGALOW, JALNA (MAHARASHTRA)**
- 3. SMT. ANITA SARASWAT W/O
PURUSHOTTAM SARASWAT HOUSE
OF SHRI KRISHNA SARASWAT,
YELLOW BANGALOW, JALNA
(MAHARASHTRA)**
- 4. SHANTABAI W/O SHRI KRISHNA
SARASWAT HOUSE OF SHRI KRISHNA
SARASWAT, YELLOW BANGALOW,
JALNA (MAHARASHTRA)**
- 5. SUNITA W/O MUDHUSADAN
SARASWAT HOUSE OF SHRI KRISHNA
SARASWAT, YELLOW BANGALOW,
JALNA (MAHARASHTRA)**

6. SUMIT S/O MADHUSUDAN SARASWAT
HOUSE OF SHRI KRISHNA
SARASWAT, YELLOW BANGALOW,
JALNA (MAHARASHTRA)
7. AMIT SARASWAT S/O MADHUSUDAN
SARASWAT HOUSE OF SHRI
KRISHNA SARASWAT, YELLOW
BANGALOW, JALNA
(MAHARASHTRA)

.....RESPONDENTS

*(BY SHRI AJAY KUMAR MIMROT, LEARNED COUNSEL FOR THE
RESPONDENT [R-1]).*

*This petition coming on for admission this day, the court
passed the following:*

ORDER

1] This Miscellaneous Petition has been filed by the petitioner under Article 227 of the Constitution of India against the order dated 08.02.2021, passed in MJC-G.W./03/2020 by Additional District Judge, Nagda, District - Ujjain (MP), whereby the petitioner's application filed under Section 9 of the Guardian and Wards Act, 1890 (*for short 'the Act of 1890'*) raising the ground of territorial jurisdiction to entertain the application filed by the respondent No.1/husband for guardianship and custody of their daughter has been rejected and it is held that Court at Nagda shall have the jurisdiction and not the Court at Nagpur where according to the petitioner, the daughter is residing.

2] In brief, the facts of the case are that the petitioner and the respondent No.1 are husband and wife and they had a dispute which led to the petitioner leaving her matrimonial house at Nagda along with her daughter in the month of April 2020, to Nagpur where her parents are residing. Since the petitioner did

not return, therefore on 28.08.2020 the respondent No.1/husband filed an application under Section 7, 10 and 12 of the Act of 1890, seeking his appointment as guardian of the minor girl and custody of the child who is aged about nine years at that relevant point of time. In the aforesaid proceedings, the application under Section 9 of the Act of 1890 was filed as aforesaid with a prayer that the proceedings be cancelled and the respondent No.1/husband be directed to file the application for custody of the minor child in the Court at Nagpur. The learned Judge of the trial Court, after considering the judgment rendered by the Apex Court in the case of *Ruchi Majoo Vs. Sanjeev Majoo reported in (2011) 6 Supreme Court Cases 479* has rejected the application holding that the daughter is residing ordinarily at Nagda only and thus, it is held that Court at Nagpur would not have the jurisdiction to entertain the same.

3] Counsel for the petitioner submits that learned trial Court has not properly appreciated the reasons assigned by the Apex Court in the case of *Ruchi Majoo (supra)* as also the mandate of Section 9 of the Act of 1890 which clearly provides that only the Court where the minor child ordinarily resides would have jurisdiction, and admittedly, after leaving Nagda, the daughter of the petitioner has taken admission in the school at Nagpur, the receipt of which has also been placed on record and thus, it cannot be said that it was a flying visit of the child to Nagpur for a temporary period. Hence it is submitted that impugned order dated 08.02.2021 be set-aside and the application filed under Section 9 of the Act of 1890 be allowed.

4] *Per contra*, counsel for the respondent-husband has

opposed the prayer and it is submitted that no illegality has been committed by the learned trial Court in rejecting the application, as prior to her departure from Nagda, the daughter of the petitioner was studying at Aditya Birla Public School, Nagda which is an admitted fact and thus merely because the daughter of petitioner has taken admission in a school at Nagpur, it cannot be said that she is ordinarily residing at Nagpur only. Thus, it is submitted by counsel for the respondent that no illegality has been committed by the learned trial Court Judge.

5] In rebuttal, counsel for the petitioner has also submitted that even according to the respondent No.1/husband, who has filed the application for guardianship, in para-10 of the application, he has stated that since he is residing at Nagda, hence the application can be entertained by the court at Nagda only.

6] Heard, learned counsel for the parties and perused the record, as also the decision relied upon by the counsel for the petitioner.

7] So far as the decision rendered in the case of *Ruchi Majoo (supra)* is concerned, although in this case a Habeas Corpus petition was filed by the Husband whereas, the wife had an interim order passed in her favour in respect of the custody of child under the Act of 1890, but the Supreme Court has dispelled the contentions of the husband and held as under (relevant excerpts only):-

“23. Section 9 of the Guardians and Wards Act, 1890 makes a specific provision as regards the jurisdiction of the court to entertain a claim for grant of

custody of a minor. While sub-section (1) of Section 9 identifies the court competent to pass an order for the custody of the person of the minor, sub-sections (2) and (3) thereof deal with courts that can be approached for guardianship of the property owned by the minor. Section 9(1) alone is, therefore, relevant for our purpose. It says:

“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.”

24. It is evident from a bare reading of the above that the solitary test for determining the jurisdiction 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.

25. 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.

26. We may before doing so examine the true purpose of the expression “ordinarily resident” appearing in Section 9(1). 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

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 Engg. Co. v. Gilbank*, F 2d at p. 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 a quality, to be vested as a right. (*Bowden v. Jensen*, SW 2d at p. 349.)”

27. 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.”

28. In *Annie Besant v. G. Narayaniah* the infants had been residing in the district of Chingleput in the Madras Presidency. They were given in custody of Mrs Annie Besant for the purpose of education and were getting their education in England at the University of Oxford. A case was, however, filed in the District Court of Chingleput for the custody where according to the plaintiff the minors had permanently resided. Repeating the plea that the Chingleput Court was competent to entertain the application Their Lordships of the Privy Council observed: (IA p. 322)

“... The District Court in which the suit

was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890. By the 9th section of that Act the jurisdiction of the court is confined to infants ordinarily resident in the district. It is in Their Lordships' opinion impossible to hold that infants who had months previously left India with a view to being educated in England and going to the University of Oxford were ordinarily resident in the district of Chingleput."

29. In *Jagir Kaur v. Jaswant Singh* this Court was dealing with a case under Section 488 CrPC and the question of jurisdiction of the court to entertain a petition for maintenance. The Court noticed a near unanimity of opinion as to what is meant by the use of the word "resides" appearing in the provision and held that "resides" implied something more than a flying visit to, or casual stay at a particular place. The legal position was summed up in the following words: (AIR p. 1524, para 8)

"8. ... Having regard to the object sought to be achieved, the meaning implicit in the words used, and the construction placed by decided cases thereon, we would define the word 'resides' thus: a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case."

30. In *Kuldip Nayar v. Union of India* the expression "ordinary residence" as used in the Representation of the People Act, 1950 fell for interpretation. This Court observed: (SCC p. 96, paras 243-46)

"243. Lexicon refers to *Cicutti v. Suffolk County Council* 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.

245. The expression coined by joining the two words has to be interpreted with reference to the point of time requisite for the purposes of the provision, in the case of Section 20 of the RP Act, 1950 it being the date on which a person seeks to be registered as an elector in a particular constituency.

246. Thus, residence is a concept that may also be transitory. Even when qualified by the word 'ordinarily' the word 'resident' would not result in a construction having the effect of a requirement of the person using a particular place for dwelling always or on permanent uninterrupted basis. Thus understood, even the requirement of a person being 'ordinarily resident' at a particular place is incapable of ensuring nexus between him and the place in question."

31. Reference may be made to *Bhagyalakshmi v. K. Narayana Rao*, *Aparna Banerjee v. Tapan Banerjee*, *Ram Sarup v. Chimman Lal*, *Vimla Devi v. Maya Devi*—and *Giovanni Marco Muzzu (Dr.)*, *In re*, in which the High Courts have dealt with the meaning and purport of the expressions like "ordinary resident" and "ordinarily resides" and taken the view that the question whether one is ordinarily residing at a given place depends so much on the intention to make that place one's ordinary abode.

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60. In cases arising out of proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There is thus a significant difference between the jurisdictional facts relevant to the exercise of powers by a writ court on the one hand and a court under the Guardians and Wards Act on the other.”

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62. It does not require much persuasion for us to hold that the issue whether the court should hold a summary or a detailed enquiry would arise only if the court finds that it has the jurisdiction to entertain the matter. If the answer to the question touching jurisdiction is in the negative the logical result has to be an order of dismissal of the proceedings or return of the application for presentation before the court competent to entertain the same. A court that has no jurisdiction to entertain a petition for custody cannot pass any order or issue any direction for the return of the child to the country from where he has been removed, no matter such removal is found to be in violation of an order issued by a court in that country. The party aggrieved by such removal, may seek any other remedy legally open to it. But no redress to such a party will be permissible before the court which finds that it has no jurisdiction to entertain the proceedings.

(emphasis supplied)

8] From the aforesaid dictum of the Supreme Court, it is apparent that the word '*ordinarily resides*' has nothing to do with the time spent by a persons at a particular place but his intention to reside at a particular place after reaching there is to be seen. And, in the case at hand, the daughter was residing with her

father the respondent no.2 until 12.07.2020, on which date, she took off with her mother to Nagpur. In Nagpur, her mother got her admitted in Aaditya Birla Public School, Nagda. It clearly leads to one and the only conclusion that after reaching Nagpur, the minor intended to reside at Nagpur only and in such circumstances, taking note of the decision rendered by the Supreme Court in the said case of *Ruchi Mazoo (supra)*, this court is of the considered opinion that the minor intended to reside at Nagpur only which also gives rise to the presumption that she is the ordinarily residing at Nagpur only and not at Nagda, where her father has filed the application.

9] In view of the same, the impugned order cannot be sustained in the eyes of law and is liable to be and is hereby set aside. Consequently, the application filed by the petitioner u/s.9 of the Act of 1890 is hereby allowed and the suit/application filed by the respondent husband Sections 7, 10 and 12 of the Act of 1890 is hereby dismissed for want of territorial jurisdiction. The respondent husband is at liberty to take resort to the jurisdiction of the court at Nagpur.

10] Petition stands *allowed* and *disposed of*.

Arun/-

(SUBODH ABHYANKAR)
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