

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT JAMMU**

MA No.29/2024

Reserved on: 18.09.2024

Pronounced on: 24 .09.2024

Sabahat Sanna daughter of Mohd Shafiq resident of at present House
No. 186 Ustad Mohalla Jammu

Appellant

Through: Ms. Deepika Pushkar Nath Advocate.

Vs.

Dr. Shabir Ahmed son of Mohd Hanief resident of Parat Gursai Tehsil
Mendhar District Poonch.

Through: Mr. H.A.Siddiqui Advocate.

**CORAM: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE**

JUDGMENT

Sanjeev Kumar J

1 This appeal by one Sabahat Sanna filed under Section 19 of the Family Courts Act, 1984 is directed against an order dated 25th July, 2024 passed by the Principal Judge, Family Court, Jammu [“the trial Court”] in File No. G&W Act/4176/2023 titled ‘Sabahat Sanna vs Dr. Shabir Ahmed’ whereby the trial Court has returned the application filed by the appellant under Sections 12 and 25 of the Guardian and Wards Act, 1890 [“Act”] in terms of Order VII Rule 10 read with Rule 10-A CPC for its presentation before the competent Court of jurisdiction.

2 Briefly put the facts leading to filing of this appeal are that the appellant filed an application under Sections 12 and 25 of the Act to seek custody of her minor daughters, aged 5 years and 4 years

respectively. The application was resisted by the respondent, who, at the outset, took a preliminary objection that in view of Section 9 of the Act, the trial Court lacked jurisdiction to entertain the petition as both the minors were putting up at village Parat, Tehsil Mendhar, District Poonch .

3 The trial Court, relying upon the provisions of Section 9 of the Act, came to the conclusion that the jurisdiction of the District Court for entertaining an application with respect to guardianship of person of the minor lies with the District Court having jurisdiction in the place where the minor ordinarily resides. The trial Court, thus, held that since both the minors, whose custody is sought by the appellant, were not ordinarily residing within the jurisdiction of the trial Court and, therefore, it had no jurisdiction to entertain the application. Consequently, the trial Court returned the application to the appellant to present it in the competent Court of jurisdiction. It is this order of the trial Court dated 25th July 2024 which is called in question before us in this appeal.

4 Having heard learned counsel for the parties and perused the material on record, the only question that was raised by learned counsel appearing for the appellant for determination in this appeal is as under:

“Whether ordinary residence of a minor for the purpose of jurisdiction in terms of Section 9 of the Act is the same as deemed custody of a minor with the mother, who, as per the Muslim Law, is entitled to custody of a minor daughter till she attains puberty ?”

5 Learned counsel for the appellant placed reliance upon Sections 6 and 17 of the Act to buttress her argument that while determining jurisdiction in terms of Section 9 of the Act, the Court must have regard to the personal law to which the minor is subject.

Strong reliance was also placed on a judgment of Delhi High Court in the case of **Akhtar Begum vs Jamshed Munir**, decided on 05.4.1978 and a judgment of a Single Bench of Punjab and Haryana High Court rendered in in CR No. 641 of 2019 titled ‘Akshay Gupta vs Divya and others.

6 With a view to appreciating the issue raised by learned counsel for the appellant, it is necessary to set out the provisions of Section 9 of the Act hereunder:

“9.Court having jurisdiction to entertain application:

(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;and,

(3)If an application with respect to the guardianship of the property 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.

7 From a plain reading of Section 9 of the Act, it is abundantly clear that subsection (1) of Section 9 identifies the Court competent to pass an order with respect to guardianship of the person of a minor. For determination of territorial jurisdiction of the Court under Section 9 of the Act, the expression “**where the minor ordinarily resides**” is a significant point for consideration. Ordinary residence of a minor is primarily a question of intention which, in turn, is a question of fact. In

Jagdish Chander Gupta vs. Dr.Kumari Bimla Gupta, AIR 2003

Allahabad 317, it was held thus:

“The expression 'ordinarily resides' and residing at the time of the application are not synonymous and stipulate different situations which are not inter-changeable. The place where the minor ordinarily resides indicates a place where the minor is expected to reside but for the special circumstances. It excludes 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. The place has to be determined by finding out as to whether the minor was ordinarily residing and where such residence would have continued but for the recent removal of the minor to different place”.

8 The Supreme Court, in the case of **Ruchi Majoo vs Sanjeev Majoo (2011) 6 SCC 479** examined the expression “ordinarily resides” appearing in Section 9 of the Act and, in paragraph 26 held, thus:

“ 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 literal interpretation is the first and 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 characterised 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)"

9 It is thus evident from Section 9(1) of the Act that it is the ordinary place of residence of the minor which determines the jurisdiction of the Court for entertaining an application for guardianship of the minor. Such jurisdiction cannot be taken away by temporary residence elsewhere on the date of presentation of the application.

10 The argument put forth by learned counsel for the appellant, that under Muslim Personal Law, a mother shall be deemed to be in custody of a minor girl till she attains puberty and, therefore, the minor should be deemed to be ordinarily residing with her at Jammu, lacks substance. This is so, as it is the ordinary residence of the minor which would determine the jurisdiction of the Court and not the residence of the natural guardian. Ordinary residence of a minor is different from the residence of the natural guardian who may be in deemed custody of the minor under personal law to which the minor is subject.

11 As is apparent from reading of the impugned order and the pleadings of the appellant, it is not the case of the appellant that the minor daughters were ever residing with her at Jammu. Rather, the case of the appellant is that the minor daughters were ordinarily residing in District Poonch before, during and after filing of the application by the appellant before the trial Court. This Court would have appreciated, had it been the case of the appellant that the appellant along with her minor daughters was ordinarily residing in Jammu and that from her custody, the minors were removed by the respondent. That would have changed the entire complexion of the case. In the

instant case, the minors never remained in Jammu, nor at any point of time intended to make Jammu as their ordinary abode.

12 The judgment passed by a Single Bench of Punjab and Haryana High Court in the case of **Akshay Gupta** (supra), with due respect, does not lay down the correct position of law, in that, the learned Single Judge has not drawn the distinction between ‘the ordinary place of residence of a minor’ and ‘the ordinary place of residence of the applicant (mother) claiming custody’. The minor may be in deemed custody of the mother, but for the purpose of determining jurisdiction, it is the ordinary residence of the minor that would be relevant. The expression “ordinary residence” has been amply explained by the Supreme Court in **Ruchi Majoo’s** case (supra) and needs no reiteration.

13 The legal proposition laid down in **Akhtar Begum’s** case (supra) is not disputed, however, the judgment is not attracted to the facts and circumstances of the case on hand.

14 Viewed from any angle, we do not find any legal infirmity or illegality in the impugned order passed by the trial Court. This appeal is found to be without any merit and is, accordingly, dismissed.

(**RAJESH SEKHRI**)
JUDGE

(**SANJEEV KUMAR**)
JUDGE

Srinagar
24.09.2024
Sanjeev

Whether the order is reportable: Yes