Chandra Kishore And Anr. vs Smt. Hemlata Gupta on 9 February, 1955

Equivalent citations: AIR1955ALL611, AIR 1955 ALLAHABAD 611

ORDER

Mukerji, J.

1. This is a revision which has been filed by Sri Chandra Kishore and Sri Sohan Lal against an order of the District Judge of Saharanpur, exercising jurisdiction over Dehra Dun Area, holding that an application made by Srimati Hemlata Gupta for her appointment as a guardian of her two minor children was maintainable in his Court.

2. Srimati Hemlata, the opposite party, was married to Chandra Kishore some years ago. This marriage produced two children Rakhesh, aged about four and a half years, and Gambhir, aged about two years and a few months. Chandra Kishore belongs to Meerut and has the permanent residence at that place. After the marriage the young couple resided in Meerut, and the children, after their birth, also resided with their parents at Meerut.

Unfortunately, the husband and the wife started having differences, so much so that Hemlata, the wife, decided to leave her husband's residence to go and live with her parents who resided at Dehra Dun. On 1-10-1953, Hemlata, with her two little sons left Meerut to arrive at Dehra Dun with the object of staying there with her parents.

The departure of Hemlata with her children caused some amount of consternation in the family, with the result that Hcmlata's father-in-law came to Dehra Dun and some how was able to return to Meerut with his two grandsons. The father-in-law returned to Meerut with the children on the 2nd, namely the same day that he had gone to Dehra Dun.

On 3-10-1953, Hemlata made the application which has given rise to this revision, for being appointed guardian of the person of her two minor children, in the court of the District Judge of Saharanpur at Dehra Dun. Her allegation in the application was that she had been deprived of her children by her father-in-law by practising fraud on her.

The application was contested by the husband and the father-in-law. We are not here concerned with all the grounds on which contest was made but with only one such ground. The ground which we are concerned in this revision is the plea of jurisdiction that was raised on behalf of the two applicants. It was contested that the Court in Dehra Dun had no jurisdiction to entertain the application. This plea was raised on the strength of Section 9, Guardians and Wards Act. The

material portion of Section 9, sub-s. (1), is in these words:

> "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."

It was contended on behalf of the applicants that the minor did not "ordinarily reside' 'within the jurisdiction of the Dehra Dun Court. The learned District Judge came to the conclusion that the Dehra Dun Court had jurisdiction. His view was that children of such tender age as the two minors in the present case must be taken to be living with their mother, and since the mother was residing, or had the intention of residing, permanently henceforward.

At Dehra Dun, the minors would also be deemed to be having their ordinary residence at Dehra Dun.

The learned District Judge found support for his view from the observations made by this Court in the case of -- 'Ram Sarup v. Chimman Lal', AIR 1952 All 79(A).

3. In order to have jurisdiction the Court must find that the minor in respect of whom the application for guardianship is made "ordinarily resides" within the jurisdiction of the Court. The question, therefore, is what the words "ordinarily resides" signify. These words have been the subject-matter of judicial interpretation. The words "ordinarily resides" obviously mean more than temporary residence, even though such residence is spread over a long period.

In the case of people" who are 'sui juris', the difficulty in applying these words is considerably minimised because the person in respect of whom the question of residence may arise can give evidence to say where he actually ordinarily resides. There may be evidence of his doing work in a particular place; there may be evidence of his having an abode in a particular place, and there may be also evidence of his being employed or of his earning his livelihood in a particular place.

Under such circumstances, namely when evidence of the character just indicated is available the question becomes not difficult of decision, for the question a to what is the ordinary residence of a person is a question of fact. The difficulty arises when this Question is to be determined in relation to the residence of a minor for, a minor cannot, in law, 'express his mind in regard to any matter.

He can have no status attaching to him by reason of any contractual obligations like that of service etc., and, therefore, the question has to be determined, when it arises in relation to a minor by reference to some other kind of evidence. Counsel for the opposite-party attempted to argue this matter on the analogy of the law applicable to domicile. I am, however, of the opinion that the law applicable to cases of domicile is really of no help in determining the question that calls for decision in this case.

4. AIR 1952 All 79 (A) was decided on a reference by the District Judge of Moradabad to this Court under Section 14, Guardians and Wards Act. Section 14 is in these words:

> "1. If proceedings for the appointment or declaration of a guardian of a minor are taken in more Courts than one, each of those Courts shall, on being apprised of the proceedings in the other Court or Courts, stay the proceedings before itself.
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> 2. If the Courts are both or all subordinate to the same High Court they shall report the case to the High Court and the High Court shall determine in which of the Courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.
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> 3. In any other case in which proceedings are stayed under Sub-section (1) the Courts shall report the case to and be guided by such orders as may be received from their respective Provincial Government."

The position that obtained in the case of Ram Sarup (A) was that guardianship proceedings had been initiated in two Courts subordinate to the High Court of Allahabad one was initiated in the Court of the District Judge of Moradabad, and the other before the District Judge of Aligarh. The district Judge of Moradabad was apprised of the fact that there was an application pending in the same matter in the Court of the District Judge of Aligarh and, therefore, the District Judge of Moradabad made a reference to the High Court for its directions under Section 14(2) of the Guardians & Wards Act. While deciding this reference, Sapru J. pointed out that "the power of this Court to determine in which Court the guardianship proceedings shall be held is of a very wide nature."

He was obviously referring to the power conferred on this Court under Section 14(2). Under Section 14(2) the decision of the High Court was not necessarily to be given with reference to the ordinary residence of the minor. The High Court could under the circumstances of any particular case direct one of the Courts in which proceedings had been initiated to go on with the matter irrespective of the fact that the minor did not "ordinarily reside" within :" jurisdiction of that Court.

Sapru J. however pointed out that while exercising its powers under Section 14(2) the High, Court should attach due weight to what was stated in Section 9 of the Act in regard to the Court's right to entertain an application for appointment of a guardian of a minor; but he did point out that that was not the sole consideration which the Court was bound to take into account in deciding the forum where the proceedings are to take place.

Mootham, J. (as he then was) agreed with Sapru J. in these conclusions but, as he has said, with some hesitation. He was of the view that in determining the question which Court was to proceed with the guardianship of a minor; the High Court ought to be guided by the consideration of the question of jurisdiction primarily, for he did not consider that the intention of the legislature was to confer upon the High Court powers by which the High Court could invest a subordinate Court with a jurisdiction under the Apt which ordinarily that Court did not possess.

The decision was ultimately given on a question of fact, namely on the fact that the minors were, actually, at the time residing with their mother within the jurisdiction of the District Judge of

Aligarh. It appears from the judgment of Mootham J. that he took the view that the mother had taken the minors away from Chandausi and since she had taken them away with the intention that they were going to stay away from Chandausi, that circumstance was taken as strong enough circumstance for finding that the residence of the minors prior to their date of departure from Chandausi had terminated and that, thereafter, their ordinary residence became Hathras where the mother and the minors had come and were at the time of the application for guardianship "ordinarily" residing, Sapru J. took a similar view, which he expressed in these words:

> "Admittedly, in this case the children are very young and they have been living with their mother. They were no doubt, until their mother left their father living in Chandausi which is in Moradabad district. It is not disputed that after her departure from Chandausi they have been living with her at Hathras. In these circumstances in this particular case an inevitable conclusion to which I am driven is that their ordinary place of residence is at the moment Hathras."

Sapru J, went on to say that when a person leaves his place where he has been residing as a permanent resident, for good that is, with no intention to come back to it and goes to some other place to live there, the former place where he used to live ceases to be his ordinary place of residence. This observation of Sapru J., I say with respect, was perfectly right in regard to the mother, but whether this statement could be right in the case of the minors who had no volition of their own is, in my view, not so convincing. If somebody else can speak the mind of the minors, then that somebody must have, the legal right to so speak on behalf of the minors.

Under certain circumstances the mother, as a natural guardian, may have that right, but not in all cases. Under the Hindu law, the father is the natural guardian and the preferential guardian of his minor children. Therefore, when there is a contest between the mother and the father in regard to what the residence of the minor children is going to be, then the mother's word cannot be accepted in preference to the word of the father.

The decision in 'Ram Sarup's case (A)' is, therefore, not binding authority for what I have to determine in this case. As I have pointed out earlier, the interpretation of Section 9, Guardians and Wards Act, did hot specifically fall for determination in that case. Learned counsel for the opposite party, that is, the mother, laid great stress on this case, particularly because the facts of 'Ram Sarup's case (A)' were somewhat similar to the facts of the case before me. Learned counsel, however omitted to see the real basis of the decision, namely the fact that at the time the application for guardianship was made in the Court of the District of Aligarh, the minors were in fact within the jurisdiction of that Judge.

5. Another case of this Court, -- 'Mst. Lalila Tawaif v. Paramatma Prasad', AIR 1940 All 329 (B) needs be noticed at this stage. This decision arose out of a First Appeal filed against an order, made by the Court below, under Section 25, Guardians and Wards Act, for the custody of certain minor children. An application was made under Section 25 by one Paramatma Prasad for the custody of certain minor children who were at the time with their natural mother, residing in village Shadiabad, within the judgeship of the District Judge of Ghazipur, the application having been made

to the District Judge of Banaras. Objection was taken to the jurisdiction of the Banaras Court on the grounds stated in Section 9(1) of the Act. It was pointed out by Ganga Nath J. that "the fact that a minor is found actually residing at a place at the time the application is made does not determine the jurisdiction."

In this case what had happened was that Mt. Lalita Tawaif who had been a mistress of Paramatma Prasad and had been residing with him at Banaras left him with her children to reside in Shadiabad in the district of Gazipur. After her departure with the children, Paramatma Prasad made an application for the custody of the minors, whom he claimed as his children, under Section 25 of the Act to the District Judge of Banaras.

Objection was made on behalf of the mother to the jurisdiction of the Banaras Court. The Judge at Banaras decided that he had jurisdiction, because according to his view of the facts, the minors' ordinary residence was Banaras. Ganga Nath J., while dealing with the appeal; pointed out that on the facts of that case it was clear that the mother of the minors had been residing at Banaras for the last six or seven years and that the minors had been living at Banaras for a major part of their lives.

The fact that the minors had been removed from Banaras only three or four months before the application was made, made no difference as to their place of ordinary residence, which according to both the District Judge and Ganga Nath J. was to be deemed to be Banaras. It was pointed out that the mere fact that the minors were taken by their mother to Shadiabad when she went to visit it would not make Shadiabad the place of ordinary residence of the minors. The ratio of this case, therefore is that in order to prescribe -- if I may use that word --for ordinary residence, the residence has to be of some permanence, and that ordinary residence cannot be a synonym for "present residence".

6. Certain observations in the case of -- 'Anilabala Chowdhurani v. Dhirendra Nath Saha', AIR 1921 Cal 309 (C) were referred to during the course of the arguments at the Bar. It may be pointed but that this case could not be a direct authority for the question that I have to consider, inasmuch as, this case was under the Lunacy Act. The words which called for interpretation in that case were not the same as here before me.

The terms the import whereof was considered in that case, were "reside" and "residence''. The Acting Chief Justice Sir Asutosh Mookerjee, pointed out, relying on certain decisions, that a man's residence is the place where his family dwells or which he makes the chief seat of "his affairs or interests". He further pointed out that whatever definition may be framed or adopted, there is one fundamental point of view which must not be overlooked, namely that the term "residence" may be used in two senses, the one denoting the "personal habitual habitation", and the other "the constructive technical and legal habitation". When a person has a fixed abode where he dwells with his family, there can be no doubt as to the place where he resides said the learned Judge the place of his personal and legal residence is the same; but he pointed out that when, on the other hand, a person has no permanent habitation or family but dwells in different places as he happens to find employment, there can equally be no doubt as to the place where he resides: he may be considered as residing where he actually or personally resides.

It was pointed out, and very rightly, that some individuals have permanent habitations where their families constantly dwell and they have other habitations where they pass a great portion of their time for purposes of services etc., so in such cases, according to this learned Judge, there arc two residences, legal residence as he calls it and the personal residence. In the case before me the minors had an ancestral home at Meerut, and they were taken from that place to Dehra Dun which was not their ancestral home.

To the question whether the mother's intention to leave the ancestral home of the minors & to take them and live with them at Dehra Dun could lawfully change the legal residence, to quote the words of Asutosh Mookerjee J. of the minors, there can be but one answer in my judgment namely an answer in the negative.

As I have already pointed out, a mother is not the legal guardian of Hindu minors, and, therefore, she cannot, in law, do anything, lawfully which may affect the rights and privileges conferred on the minors. The question is likely to be asked whether being subject to one territorial jurisdiction or another is a privilege or legal status? Being subject to one jurisdiction or another may not be, strictly speaking, cither of the two aforementioned things, but nonetheless, in my view, it is an important thing, almost akin to a legal status.

The framers of the law relating to guardians and minors laid some emphasis on the question of jurisdiction, and the wisdom of it is not far to seek, when we remember that it is the Court within whose jurisdiction the minor resides that has the primary responsibility imposed on it by law to safeguard the interest of a minor and to see to its welfare. A Court within whose jurisdiction a minor has been ordinarily residing, undoubtedly has, or is supposed to have, better knowledge about the affairs of the minor and have better ideas about its well being than a Court within whose jurisdiction the minor is taken temporarily, so to speak, or the minor is moved for a brief stay.

7. In the case of -- 'Nazir Begam v. Ghulam Qadir Khan', AIR 1937 Lah 797 (D), Skemp J. held that a minor who lived during the major part of her life in the Multan district and had been moved from that district a few weeks before the application was made for her guardianship would be deemed to be residing ordinarily within the jurisdiction of the Multan Court.

8. In the case of -- 'Smt. Vimlabai v. Baburao Shamrao', AIR 1951 Nag 179 (E) it was held that where a Hindu minor had been living in Amraoti continuously for over a year with her father, she must be deemed to reside ordinarily in Amraoti even though before going to Amraoti the minor lived at Nagpur with her mother and even though the stay at Nagpur was longer than the stay at Amraoti. It was pointed out in this case that under the Hindu law the father is the natural guardian of his children and his children must be deemed to reside where he resides. It was further pointed out that while the minor stayed at Nagpur with the mother her stay there would be deemed to be in charge of the mother on behalf of the father who was her natural guardian.

9. In order to give the Court jurisdiction to entertain an application the minor must be "ordinarily residing" within the local limits of that Court's jurisdiction, that is so provided by Section 9 of the Act. The fact of this case indicate, as I have already pointed out, that the minors had an ancestral

home in Meerut, that they had been there during the better part of their short life, and that they had been at Dehra Dun only for a very brief span of a few hours.

Under these circumstances, on the facts, there could be no difficulty in holding that the minors' "ordinary residence" was Meerut. The legal discussion that was entered into by learned counsel appearing on behalf of the mother could not as I have already pointed out, alter that position. So that I must hold, as I do, that the minors were not ordinarily residing within the territorial jurisdiction of the Court at Dehra Dun and that the learned Judge's order holding that he had jurisdiction was erroneous.

10. Learned counsel for the opposite party, as a last resort, argued that I should refrain from interfering with the order of the Court below inasmuch as no injustice was likely to accrue if the case was tried at Dehra Dun instead of at Meerut. It was further argued by learned counsel that in this case the applicants had removed the minors from the jurisdiction of the Dehra Dun Court to Meerut by practising fraud on the mother of the minors who was the applicant before the District Judge of Sahranpur.

I regret I cannot give effect to this contention of learned counsel, for I am reminded of the following words of that great Chief Justice of America, Marshall:

> "…. ..judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, & can will nothing. When they are said to exercise a discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."

11. For the reasons given above, I allow this application in revision, set aside the order of the Court below and direct that the application for guardianship be returned to Srimati Hemlata Gupta for presentation to the proper Court. Under the circumstances of this case I make no order as to the costs of this petition, and I direct the parties to bear their own costs of this petition and the costs incurred in the Court below.