

GAHC010061402023



2024:GAU-AS:10752

IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

Tr.P.(C).No.23/2023

Smti Usma Sultana,
W/o-Sri Habibar Rahman,
Village-Bhatnapaity Char,
P.O.-Baghbar Char,
P.S.-Alopati, District-Barpeta, Assam,
Pin-781127.

.....Petitioner

-Versus-

Fakar Uddin Ahmed,
S/o-Late Abed Ali,
Village-Bhakhuradia,
P.O. Tupamari, P.S.-Nagarbera,
District-Kamrup, Assam,
Pin-781127.

.....Respondent

For Petitioner	:	Mr. S.H. Rahman, Advocate.
For Respondent	:	S. Hoque, Advocate.
Date of Judgment	:	05.11.2024.

**BEFORE
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA
JUDGMENT & ORDER (CAV)**

1. Heard Mr. S.H. Rahman, learned counsel for the petitioner. Also heard Mr. S. Hoque, learned counsel for the respondent.

2. This application under Section 24 of the Code of Civil Procedure, 1908 read with Section 151 of the said code has been filed by the petitioner, namely, *Smti Usma Sultana* praying for transferring of the Misc. Guardianship Case No. 03/2022 from the Court of the learned District Judge, Kamrup at Amingaon to the Court of the learned District Judge, Barpeta.

3. The facts relevant for consideration of the instant transfer petition, in brief, are as follows: -

- i.** That the petitioner and the respondent were married to each other on 24.07.2016 as per Islamic rites and rituals. Out of the said wedlock, a male child was born on 04.05.2018, who has been named as Master Omar Faruk Jaman, and was about five years old at the time of filing of this transfer application.

- ii.** After about 4 ½ years of the marriage, the respondent and his family members started torturing the petitioner and there arose matrimonial differences between both the parties and it became impossible for the petitioner to continue her conjugal life with the respondent. As a result of the aforesaid circumstances, the petitioner left the house of respondent in the month of May, 2022 along with her child and was staying at her parent's house in the district of Barpeta.

4. Mr. S. H. Rahman, learned counsel for the petitioner has submitted that the petitioner ultimately decided to dissolve her marriage with the respondent and accordingly she made a declaration to that effect before notary, Darrang, Mangaldai on 26.07.2022 and the respondent was informed about the same by sending a copy of the said declaration to him.

5. It is also submitted by the learned counsel for the petitioner that thereafter the petitioner married one Habibar Rahman, son of Samsul Hoque, who is the resident of village Bhatnapaity Charunder Alopatti, Police

Station in the district of Barpeta on 12.09.2022 by executing a marriage agreement on the said date.

6. It is further submitted by the learned counsel for the petitioner that after her marriage with the said Habibar Rahman, the petitioner started living as his wife along with her minor child in the house of said Habibar Rahman at village Bhatnapaity Charunder Alopai Police Station in the district of Barpeta.

7. It is also submitted by the learned counsel for the petitioner that the son of the petitioner, namely, Master Omar Faruk Jaman, who was also staying with her, was admitted in "Ankur" class at Nava-Nur Jatiya Vidyalaya, Bhatnapaity Char on 01.11.2022.

8. The learned counsel for the petitioner has submitted that the petitioner has delivered a girl child on 06.08.2023 from your new husband.

9. The learned counsel for the petitioner has submitted that in the meanwhile, the respondent has filed an application under Sections 9 and 12 of the Guardians and Wards Act, 1890, in the Court of learned District Judge, Kamrup, Amingaon seeking custody of her minor child, namely, Master Omar Faruk Jaman. The said guardianship

case has been registered as Misc. Guardianship Case No. 03/2022.

10. It is also submitted by the learned counsel for the petitioner that in connection with the said guardianship case, a Misc. Case being Misc. (J) Case No. 5/2023 was also registered, wherein an interim order was passed against the present petitioner to bring the minor child at Atal Udyan, Adabari, Guwahati to meet the respondent on the first Sunday of every month.

11. The learned counsel for the petitioner has submitted that the Court of learned District Judge, Kamrup, Amingaon does not have the jurisdiction to entertain the application under Sections 9 and 12 of the *Guardians and Wards Act, 1890*. It is submitted that the appropriate Court having jurisdiction to entertain such an application would be a Court having jurisdiction over the place where the minor ordinarily resides. However, he submits that in the instant case, the minor Master Omar Faruk Jaman is residing with his mother i.e., the petitioner, in the residence of the husband of the petitioner, namely, Habibar Rahman since after the marriage of petitioner with Habibar Rahman. He also submits that the fact that the

minor Master Omar Faruk Jaman is the ordinary resident of Bhatnapaity Char in the district of Barpeta would also be revealed from the fact that he is a student of class "Ankur" in Nava-Nur Jatiya Vidyalaya, Bhatnapaity Char and in support of the said submission, the learned counsel for the petitioner has also annexed as Annexure-5a copy of admission receipt dated 01.11.2022 issued by the school.

12. The learned counsel for the petitioner has also submitted that even in the application filed by the respondent under Sections 9 and 12 of the *Guardians and Wards Act, 1890* before the Court of learned District Judge, Kamrup, Amingaon, the respondent has disclosed and admitted the fact that the petitioner is now living as wife of one Habibar Rahman in Bhatnapaity Char in the district of Barpeta.

13. The learned counsel for the petitioner has submitted that as it is apparent from the facts revealed from the materials on record that the minor whose guardianship is sought for in the Misc. Guardianship Case No. 03/2022 is an ordinary resident of Barpeta district, hence, he submits that the Court of District Judge at Amingaon does not have the jurisdiction to entertain the application filed by the respondent.

14. The learned counsel for the petitioner also submits that the respondent himself is a primary schoolteacher and presently working as Headmaster at 959 No. Kedighi L.P. School under Chenga Block in the district of Barpeta, however, in spite of that he had filed the guardianship application in the Court of District Judge, Kamrup at Amingaon only to harass the present petitioner.

15. The learned counsel for the petitioner has also submitted that the petitioner is not denying the fact that she has left the respondent and has married to Habibar Rahman, however, he submits that the said marriage has not been challenged by the respondent. He also submits that even if the marriage of the petitioner with Habibar Rahman is questioned, the fact that her son is staying with her in the residence of Habibar Rahman and that he is a student of School i.e., namely, Nava-Nur Jatiya Vidyalaya, Bhatnapaity Char since, last two years, is not disputed. Hence, he submits that the Court of learned District Judge, Kamrup, Amingaon does not have jurisdiction to entertain the application filed by the respondent and he also submits that for the said reasons the Misc. Guardianship Case No. 03/2022 may be transferred to the Court of learned District Judge, Barpeta which is the jurisdictional Court to entertain

any such petition regarding guardianship of her minor son Master Omar Faruk Jaman.

16. On the other hand, the learned counsel for the respondent has submitted that the petition filed by the petitioner for transfer of the Misc. Guardianship Case No. 03/2022 from the Court of learned District Judge, Kamrup, Amingaon to the Court of learned District Judge, Barpeta is not maintainable.

17. The learned counsel for the respondent has submitted that his son Master Omar Faruk Jaman was born on 04.05.2018 at Simlitola M.P.H.C. in the district of Goalpara and after his birth he was residing in the residence of the respondent at village Bhakhuradia under Nagarbera Police Station in the district of Kamrup along with her mother i.e., the petitioner.

18. The learned counsel for the respondent has also submitted that on 12.09.2022, the respondent after coming back to his residence from his school did not find his wife i.e., the petitioner and his son in the house. Thereafter, on the next date i.e., 13.09.2022, he filed an application regarding missing of his wife and son who was

aged about 4 years and 3 months at that time before the Officer-in-Charge of Nagarbera Police Station.

19. The learned counsel for the respondent has submitted that his son was also admitted in LKG class at Holy child Public School at Nagarbera when he was residing with the respondent and in support of his submissions, he has annexed a money receipt issued by the school authority.

20. The learned counsel for the respondent has also submitted that the petitioner has made false accusations against the respondent in her transfer application as she was never subjected to any cruelty or never harassed by the respondent when she resided with her in his residence at Nagarbera.

21. The learned counsel for the respondent has also submitted that the petitioner married for the second time to one Habibar Rahman without lawfully dissolving her marriage with respondent. He submits that the notary does not have power to dissolve any marriage under law and the petitioner did not take lawful recourse to dissolve her marriage with the respondent before entering into the second marriage with Habibar Rahman. He, therefore,

submits that the marriage of the petitioner with Habibar Rahman is illegal marriage and, hence, address of Habibar Rahman cannot be shown as the address for the petitioner herself or to show that her child from the first marriage i.e., Master Omar Faruk Jaman is an ordinary resident of the place where the residence of Habibar Rahman is situated.

22. In support of submissions made by him, learned counsel for the respondent has cited following rulings:

- (i) ***"Dipika Agarwal (NEE Khaitan) –Vs- Rishi Agarwal* reported in *2020 Legal Eagle (Cal)*109;"**
- (ii) ***"Amal Saha –Vs-Smt.Basana Saha* reported in *AIR 1988, Gauhati 22."***

23. I have considered the submissions made by learned counsel for both the sides and have perused the materials available on record carefully including the scanned copy of the records of Misc. Guardianship Case No. 03/2022.

24. The main contention of the petitioner for filing the instant transfer petition is that her minor son is now residing with her in the residence of Habibar Rahman in Bhatnapaity Char in the district of Barpeta. It is the

contention of the petitioner that as the minor son of the petitioner is now a resident of Bhatnapaity Char in the district of Barpeta, the Court of learned District Judge, Kamrup (Amingaon) does not have jurisdiction to entertain an application under Section 9 of the *Guardians and Wards Act, 1890*. The petitioner contends that, at the time of filing the application for guardianship of her minor son, he was an ordinary resident of Bhatnapaity Char in the district of Barpeta. Therefore, under Section 9 of the *Guardians and Wards Act, 1890*, the Courts in Barpeta had jurisdiction to entertain the application.

25. For the sake of convenience the provision of Section 9 of the *Guardians and Wards Act, 1890*, is quoted herein below: -

"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. If the application is with respect of 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 the place where he has property.

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 on conveniently by any other District Court having jurisdiction.”

26. A cursory review of the above provisions suggests that an application for the guardianship of a minor can be made only to the District Judge with jurisdiction over the place where the minor ordinarily resides. The meaning of the phrase “ordinarily resides” has been considered in several judgments and it was held that the phrase “ordinarily resides” have a different meaning than the phrase “residence at the time of application.” In this regard, this Court in the case of ***Amal Saha –Vs- Smt. Basana Saha*** (supra) has discussed a catena of judgments where the expressions “ordinarily residence”, used in the Section 9 of the aforesaid Act, has been discussed and

explained. For the sake of clarity, the authorities discussed in the aforesaid judgment is reproduced herein below:-

"7. In Mst. Firoza Begum v. Akhtaruddin Laskar, AIR 1963 Assam 193, a Division Bench of this Court considered the said sub-section. In that case two petitions were filed, one before the learned District Judge, Cachar at Silchar and another before the learned Additional District Judge, Gauhati and the minors were living with their mother at Cachar. This Court held that as the minors had been residing at Silchar for about 3 years, the learned District Judge, Silchar had jurisdiction as the requirement of Section 9 of ordinary residence was satisfied. In Chimanlal Ganpat v. Rajaram Maganchand Oswal, AIR 1937; Bom 158, it was held that under the aforesaid Act, in order to give the Court jurisdiction the minor must be 'ordinarily resident' within the local limits of the jurisdiction of the Court. The same view was expressed in Sarada Nayar v. Vayankara Amma, AIR 1957 Ker 158. However, the Court further held that such a place of residence has to be determined by finding out as to where the minor was ordinarily residing and where such residence would have continued but for the recent removal of the minor to a different

place. In Jamuna Prasad v. Mst. Panna, AIR 1960 All 285, it was held that the words "ordinarily resident" have a different meaning than "residence at the time of the application" and that to interpret the words "where the minor ordinarily resides to mean "where the minor actually resides at the time of the application" may in some cases amount to rendering nugatory all the provisions of the Act. In Shah Harichand Ratanchand v. Virbbal, AIR 1975 Guj 150, the Court held that the legislative test of the Court which has jurisdiction is the Court where the minor ordinarily resides and not the Court where, the father resides and with whom the minor must be deemed to have been in constructive custody. However, in Tilak Raj Kapoor v. Smt. Asha Kapoor, AIR 1979 Raj 128, wherein it was held that the test, which the legislature has provided is that the Court which has jurisdiction for hearing an application is the Court where the minor 'ordinarily resides' and with whom the minor must be deemed to have been in constructive custody. In Smt. Aparna Banerjee v. Tapan Banerjee, AIR 1986 Punj and Har 113 considering the fact that the children were living with her mother for more than 3 years, the Court rejected the application for the

custody of the child filed by the father at a place where he was residing.”

27. From above, it is clear that to assume jurisdiction under Section 9 of the *Guardians and Wards Act, 1890*, the minor, the guardianship of whom is the subject matter of the application, must be an ordinary resident of the place over which the jurisdiction of such District Judge extends. It is also clear that the expression “ordinarily resident” has a different meaning than the expression “residence at the time of application. “The Court has to ignore recent removal, if any from a place where the minor ordinarily resides.

28. In the instant case on perusal of the records of scanned copy of Misc. Guardianship Case No. 03/2022, which was requisitioned in connection with this case, it appears that the minor, Omar Faruk Jaman, was born on 4th of May 2018 and till 12.09.2022, he was staying with his parents in the residence of the respondent at village Bhakhuradia, under Nagarbera police station in the district of Kamrup, and it was only on 12th of September 2022, when the petitioner took shelter in her parents' residence at Barpeta, she brought her minor's son along with her. It also appears from record that the respondent had filed an

application under Section 9 and 12 of the *Guardians and Wards Act, 1890*, before the Court of learned District Judge, Kamrup (Amingaon) on 6th of December 2022, that is within less than 3 months of the date when the minor was removed from his residence. It also appears from record that though the minor was residing at Barpeta with his mother when the respondent had filed the application under Section 9 and 12 of the *Guardians and Wards Act, 1890*, in the Court of learned District Judge, Kamrup (Amingaon), however, there is no denial of the fact that before 3 months from the date of filing of the said application, the minor was an ordinary resident of village Bhakhuradia in the district of Kamrup, Assam, where the jurisdiction of learned District Judge, Kamrup (Amingaon) extends.

29. From the decisions cited in the foregoing paragraphs, it is clear that the law is settled in this regard that when a child is removed to a place from the place where he was ordinarily residing, the place of such removal will be ignored for the purpose of determining the jurisdiction of the Court to entertain an application under *Guardians and Wards Act, 1890*, and in spite of such removal, the minor will be deemed to have his residence at the place where he or she was ordinarily residing before such removal. The

new place to which the minor might have been removed will become the place of ordinary residence of minor only after minor has settled down at that place for reasonably long period. The expression, “where the minor ordinarily resides” in the Section 9 of the *Guardians and Wards Act, 1890*, appears to have been deliberately used to exclude places to which the minor may be removed at or about the time of filing of the application for enforcement of guardianship and custody of the minor.

30. In the instant case, the minor Omar Faruk Jaman was residing at village Bhakhuradia in the district of Kamrup till 12.09.2022 and within a period of less than three months of the said removal the Misc. Guardianship Case No. 109/2022 has been filed by the father, i.e. the respondent in this case, before the Court of learned District Judge, Kamrup, Assam.

31. From the facts and circumstances of this case as discussed in the foregoing paragraphs, this Court is of considered opinion that the place where the minor was ordinarily residing before his removal to Barpeta falls within the territorial jurisdiction of the Court of the District Judge, Kamrup, Amingaon, hence, the said Court has the

jurisdiction to entertain the application under Guardians and Wards Act, 1890, in this case. Moreover, on perusal of the scanned copy of records, it appears that the case has progressed fairly well and the petitioner has participated in the proceeding and it is fixed for final hearing before the Court of learned District Judge, Kamrup Assam, hence, it may not be appropriate to transfer the Guardianship case from the said Court at this stage.

32. For the reasons discussed in above paragraphs, this Court is of considered opinion that this is not a fit case where the power under Section 24 of the Code of Civil Procedure may be exercised for transferring the Misc. Guardianship Case No. 03/2022, from the Court of learned District Judge Kamrup (Amingaon) to the Court of learned District Judge, Barpeta. The prayer for transfer is, therefore, rejected and this transfer petition is hereby dismissed.

33. The parties shall bear their own cost.

JUDGE

Comparing Assistant