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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

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Date of decision : 13.01.2025

Nitin Diwan

..... Petitioner

Versus

Rajni Bhatia @ Rajni Diwan @ Aradhna Diwan

..... Respondent

CORAM : HON'BLE MR.JUSTICE PANKAJ JAIN

Present :- Mr. J.S. Ghuman, Advocate
for the petitioner.

Ms. Kusum Raj, Advocate
for the respondent.

PANKAJ JAIN, J. (ORAL)

1 Instant revision petition is directed against order dated 06.02.2024 whereby application filed by the present petitioner under Order 7 Rule 11 CPC seeking dismissal of the petition filed by respondent under Sections 7 and 8 of the Guardians and Wards Act, 1890 (for short 'the 1890 Act') stands declined.

2 Parties to the *lis* are husband and wife who are living separately. They are fighting for the custody of a minor child. Earlier petitioner filed petition under Section 7 and 8 of the 1890 Act before District Judge, Ludhiana at Ludhiana seeking legal custody of the child even though the child was physically with him. Respondent-wife moved an application

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seeking transfer of the same before this Court. The same was allowed vide order dated 27.03.2019 observing as under :-

“ After hearing the rival contentions and going through the authorities referred to by learned counsel for the parties, I find that no doubt the competent Court having jurisdiction over the area where the minor actually resides has got the jurisdiction but other facts and circumstances are also to be taken into consideration. According to the applicant, she does not have any source of income. It is difficult for her to travel from Jalandhar to Ludhiana to attend the dates of hearing in the Court there.

*The Apex Court in various judgments has observed that in matrimonial disputes between the spouses convenience of wife should be looked into. In that regard a reference can be made to authority **Sumita Singh Versus Kumar Sanjay and another**, 2002 AIR(SC) 396 by a Division Bench of Hon'ble Supreme Court.*

*In **Bhartiben Ravibhai Rav Versus Ravibhai Govindbhai Rav**, 2017(3) RCR(Civil) 369, the Apex Court had allowed application for transfer of the divorce petition to a place where the wife was residing considering various factors including the distance between the place where the wife was residing and the place of sitting of the Court where divorce petition had been instituted and the fact that the wife had filed two cases against her husband in the Court at the place of her residence wherein the respondent had already put in appearance.*

*In **Apurva Versus Navtej Singh**, 2017(2) Law Herald 966 by a Co-ordinate Bench of this Court, it was observed that wherever the Courts are called upon to consider the plea of transfer in matrimonial disputes, the Courts have to take into consideration various factors like economic soundness of either of the parties, the social strata of the spouses to which they belong and behavioural pattern, standard of life antecedents of marriage. Generally it is the wife's convenience, which must be looked at by the Courts while deciding the transfer application.*

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Keeping in view the contentions in the application and submissions made by learned counsel for the applicant, in which I find merit, in absence of any strong circumstance to the contrary, it would be proper and appropriate, if the application is accepted. The same is accordingly allowed. The petition in question is ordered to be withdrawn from the Court of Guardian Judge, Ludhiana and transferred to Family Court at Jalandhar for disposal in accordance with law.

The parties through their counsel are directed to appear in the transferee Court on 25.04.2019. Copies of orders be sent to both the Courts for information and necessary compliance.”

After the proceedings were transferred to Family Court Jalandhar, petitioner withdrew the custody application.

3 The instant petition has been filed by respondent-wife seeking custody of child invoking Section 7 and 8 of the 1890 Act. The petition has been instituted at Jalandhar. In the present petition, petitioner filed an application under Order 7 Rule 11 CPC, seeking dismissal thereof for want of jurisdiction claiming that since the child was ordinarily residing at Ludhiana so it is the Courts at Ludhiana only that would have jurisdiction. The application stands dismissed vide impugned order dated 06.02.2024.

4 Prior to filing of the instant revision petition impugning the order dated 06.02.2024 passed by Principal Judge, Family Court Jalandhar, husband-petitioner moved transfer application before this Court seeking transfer of the proceedings from Jalandhar to Ludhiana. The same was dismissed vide order dated 22.03.2024. Relying upon the impugned order, this Court held that once the father has suffered order under Order 7 Rule 11

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CPC, he is precluded from raising same issue with respect to lack of jurisdiction in the transfer application. This Court dismissed revision petition observing as under :-

“ 7. On a query of the Court, it is fairly conceded that the aforesaid order dated 06.02.2024 has not been challenged by the petitioner-husband.

8. In the light of above, I am of the considered opinion that having failed in an application under Order 7 Rule 11 CPC to secure return of the petition on the ground of jurisdiction, the same argument of lack of jurisdiction cannot be raised in a petition seeking transfer of the proceedings from Jalandhar to Ludhiana, while having accepted the finding recorded in the order dated 06.02.2024 and by not seeking judicial redress against the same.”

The said order dated 22.03.2024 has not been assailed further and has attained finality.

5 Section 9 of 1890 Act deals with jurisdiction of courts to entertain application for custody of minor. The same reads as under:-

“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.

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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 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 [129 F 2d 135 (CCA 9th Cir 1942)] , 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



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quality, to be vested as a right. (Bowden v. Jensen [359 SW 2d 343 (Mo Banc 1962)] , 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 [(1913-14) 41 IA 314 : AIR 1914 PC 41] 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 [AIR 1963 SC 1521 : (1963) 2 Cri LJ 413] 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*

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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 [(2006) 7 SCC 1] 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 [(1981) 1 WLR 558 : (1980) 3 All ER 689 (DC)] 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



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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 [AIR 1983 Mad 9] , Aparna Banerjee v. Tapan Banerjee [AIR 1986 P&H 113] , Ram Sarup v. Chimman Lal [AIR 1952 All 79] , Vimla Devi v. Maya Devi [AIR 1981 Raj 211] and Giovanni Marco Muzzu (Dr.), In re [AIR 1983 Bom 242] , 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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36. It is evident from the statements and the pleadings of the parties that the question whether the decision to allow the appellant and Kush to stay back in Delhi instead of returning to America was a voluntary decision as claimed by the appellant or a decision taken by the respondent under duress as alleged by him was a seriously disputed question of facts, a satisfactory answer to which could be given either by the District Court where the custody case was filed or by the High Court only after the parties had been given an opportunity to adduce evidence in support of their respective versions.

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8 In view of afore-stated position of law, this Court is of the opinion that issue of jurisdiction cannot be ascertained at this preliminary stage but can only be adjudicated after evidence comes on record. The

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question whether child is residing at Ludhiana as result of unilateral decision of father or he is there with consent of both will be germane and pertinent to answer the issue of jurisdiction. Otherwise also, lack of jurisdiction cannot be a ground to reject the application under Order 7 Rule 11 CPC though it may lead to return thereof.

9 Resultantly, the revision is dismissed.

10 Since the main case has been decided, the pending miscellaneous application, if any, shall also stand disposed off.

13.01.2025*Pooja Sharma-I***(PANKAJ JAIN)
JUDGE**

Whether speaking/reasoned:

Yes/No

Whether reportable:

Yes/No