A.F.R.
Reserved
Neutral Citation No. - 2024:AHC:87786-DB

Court No. – 29

Case :- First Appeal No. 373 of 2024

Petitioner :-
Respondent:
Counsel for Petitioner:- Satyendra Narayan Singh

Hon'ble Vivek Kumar Birla, J.
Hon'ble Syed Qamar Hasan Rizvi, J.

(Per: Hon'ble Syed Qamar Hasan Rizvi,J.)

1. This Appeal under Section 19 of the Family Courts Act, 1984 arises out of the judgment and order dated 18.03.2024 passed by the Additional Principal Judge, Family Court No. 4, Ghaziabad in Misc. Case No. 15/2021 under section 25 of the Guardians and Wards Act, 1890 (Smt. Chetna Goswami versus Dheeraj).

2. The grievance of the appellant is that the learned Court below, vide impugned order dated 18.03.2024, has rejected his application filed under Order VII Rule 11 of the Code of Civil Procedure, 1908.

3. The relevant facts of the case, in brief, are that the respondent, Smt. Chetna Goswami filed a petition having Case No. 15 of 2021 under section 25 of the Guardians and Wards Act, 1890, before the learned Family Court at Ghaziabad seeking custody of her child, namely, having date of birth as 18.08.2013.

4. The case of the appellant as narrated in the writ petition is that after coming to know about the case through Court Notice published on 22.10.2021 in the newspaper 'Rastriya Sahara', he preferred an application under Order VII Rule 11 read with Section 151 of the Code of Civil Procedure, 1908, in Case No. 15 of 2021 pending before the Court of

Additional Principal Judge, Family Court No. 4, Ghaziabad, *inter alia*, praying for the dismissal of the aforesaid case filed by the respondent under Section 25 of the Guardians and Wards Act, 1890. The ground taken by the Appellant in the said application filed under Order VII Rule 11 of the Code of Civil Procedure, 1908 was that Family Court at Ghaziabad lacks territorial jurisdiction to entertain the said case, as the minor is currently studying at K.M. Public School (Senior Secondary), Bhiwani, Haryana.

5. The learned Court below on the basis of the averments made in the application under Order VII Rule 11 of the Code of Civil Procedure, 1908, passed a detailed order dated 18.03.2024 whereby the application filed by the appellant was rejected. For a ready reference, extract of the said order dated 18.03.2024 passed by the Additional Principal Judge, Family Court, Court No. 4, Ghaziabad is being reproduced below:

> *"6- पत्रावली के अवलोकन से स्पष्ट है कि प्रार्थनी की ओर से प्रस्तुत वाद विपक्षी के विरुद्ध अंतर्गत धारा 25 गार्जियन वाड्र्स एक्ट प्रस्तुत वाद विपक्षी के विरुद्ध अंतर्गत धारा 25 गार्जियन वाड्र्स एक्ट प्रस्तुत करके अपने नाबालिग पुत्र कुंज की अभिरक्षा विपक्षी से हटाकर प्रार्थनी को दिए जाने के अनुतोष हेतु प्रस्तुत किया गया है। पत्रावली के अवलोकन से स्पष्ट है कि विपक्षी का स्थाई पता आवास सं० जी-133, संजयनगर, सेक्टर-23 थाना कविनगर, जनपद गाजियाबाद है। विपक्षी द्वारा पत्रावली में दाखिल अपना आधार कार्ड की छायाप्रति के अवलोकन से स्पष्ट है कि उसका स्थाई पता जनपद गाजियाबाद है, जिससे विपक्षी इन्कार नहीं करता है। प्रार्थना पत्र 27 में के माध्यम से विपक्षी का यह कहना है कि वर्तमान में उसका पुत्र भिवानी, हरियाणा में शिक्षा ग्रहण कर रहा है व विपक्षी का अस्थायी पता भितानी, हरियाणा है, जिसके समर्थन में उसने कागजात 36 ग/2 ता ग 36 / 5 दाखिल किए है। उक्त कागजात के अवलोकन से यह स्पष्ट होता है कि भिवानी, हरियाणा में विपक्षी का पता अस्थाई है जबकि उसका स्थाई पता जनपद गाजियाबाद में है।*
>
> *7- Section 9(1) Guardians and Wards Act, 1890 deals with Court having jurisdiction to entertain application. It confers that if the application 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.*
>
> *8- उक्त प्राविधान से स्पष्ट है कि न्यायालय की क्षेत्राधिकारिता कथित नाबलिग के स्थाई निवास से ही निर्धारित होगी व इस कारण ही माननीय प्रधान न्यायाधीश द्वारा प्रस्तुत वाद दर्ज रजिस्टर कर विपक्षी को नोटिस प्रेषित किया गया। कथित नाबालिग का स्थाई पता उसके पिता का स्थाई पता है, जो जनपद गाजियाबाद का*

है, जिसे उभयपक्ष स्वीकार भी करते है। नाबालिग को पढ़ाई के प्रयोजन से कही बाहर जनपद भिवानी हरियाणा ले जाए जाने से उसके स्थाई निवास के पते में कोई विपरीत प्रभाव नहीं पड़ता है विपक्षी के आधार व कागज सं० 36 ग /2 में भी पता अस्थाई ही दर्ज है। धारा 25 गार्जियन एण्ड वाड्र्स एक्ट के प्रार्थना पत्र के निस्तारण में न्यायालय को यह देखना है कि बच्चे का भविष्य किसके पास सुरक्षित है व कौन उसके भलाई के लिए उत्तम पक्ष होगा। जनपद गाजियाबाद के परिवार न्यायालय उक्त आदेश गुणदोष पर पारित करने का क्षेत्राधिकार हासिल है।

9- उपरोक्त सम्पूर्ण विवेचना के आधार पर यह निष्कर्ष निकलता है कि इस न्यायालय को प्रस्तुत वाद के सुनवाई का क्षेत्राधिकार हासिल है व प्रस्तुत दावा आदेश 7 नियम 11 सिविल प्रक्रिया संहिता के प्राविधान में बाधित नहीं कहा जा सकता है व तदनुसार प्रार्थना पत्र 27 में अन्तर्गत आदेश 7 नियत 11 सिविल प्रक्रिया संहिता निरस्त किये जाने योग्य है।

<u>आदेश</u>

विपक्षी का प्रार्थना पत्र 27 ग अंतर्गत आदेश 7 नियम 11 सिविल प्रक्रिया संहिता निरस्त किया जाता है।

पत्रावली वास्ते सनुवाई प्रार्थना पत्र 26 ग जवाबदावा/तनकी दिनांक 30-04-2024 को पेश हो/"

6. Being aggrieved by the aforesaid order dated 18.03.2024, the appellant preferred the instant appeal. While pressing the appeal, the learned Counsel for the appellant most emphatically argued that the learned Court below, without taking into consideration the fact that when on 25.10.2023, the application under Order VII Rule 11 read with Section 151 of the Code of Civil Procedure, 1908 was filed raising the question of territorial jurisdiction on account of the fact that the child lives in Bhiwani, Haryana and is receiving his education there. As such, petition under section 25 of the Guardians and Wards Act,1890 could not be filed or entertained in the Court having its jurisdiction at Ghaziabad.

7. It has further been pleaded that on 18.03.2024, the learned Family Court has dismissed the application filed under Order 7 Rule 11 of the Code of Civil Procedure, 1908 on the ground that the jurisdiction for filing the Case shall be ascertained from the permanent residence, which does not mean permanent address of the ward. The appellant has further submitted that the Family Court has misinterpreted the provisions of Section 9 (1) of the

Guardians and Wards Act, 1890 and has misconstrued the expression "where the minor ordinarily resides". It has further been submitted that the question vested in the expression "where the minor ordinarily resides" is a mixed question of fact and law and the same cannot be answered without holding enquiry into the factual aspect of the controversy.

8. Heard Sri Satyendra Narain Singh, learned counsel for the appellant and perused the material available on record.

9. The question that has culled out for consideration in the instant appeal is whether the learned court below has committed any illegality while deciding the application under Order VII Rule 11 of the of the Code of Civil Procedure, 1908 by interpreting the provisions of Section 9 of the Guardians and Wards Act, 1890.

10. For the better appreciation of the case, Section 9 of the Guardians and Wards Act, 1890 is being reproduced 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.*
>
> *(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.*
>
> *(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."*

11. From a bare reading of section 9 of the Guardians and Wards Act, 1890, it is evident that sub-section (1) of Section 9 identifies the Court competent to pass an order for the custody 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.

12. For determining the territorial jurisdiction of the Court under section 9 of the Guardians and Wards Act, 1890, the expression “where the minor ordinarily resides” is the pivotal point for consideration. The said expression has been used in different contexts and has often come up for interpretation before the courts of law. While reading the said expression “where the minor ordinarily resides”, it is imperative to see whether the minor is ordinarily residing at a given place? This 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 jurisdictional facts are admitted, it can never be a pure question of law, capable of being answered without any enquiry into the factual aspects of the controversy.

13. While explaining the expression “where the minor ordinarily resides”, the Hon'ble Supreme Court in the case of **Jagdish Chandra Gupta versus Dr. Ku. Vimla Gupta,** reported in **AIR 2003 All 317**, has been pleased to hold as under:

> ***“19.*** *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.”*

14. Further, in the case of **Manish Sehgal** versus **Meenu Sehgal** reported in **(2013) 202 DLT 87**, rendered by the High Court of Delhi and affirmed by the Hon’ble Supreme Court of India vide its order dated 30.01.2014 in **Manish Sehgal** versus **Meenu Sehgal, S.L.P. (Civil) No(s). 1590-1590 of 2014**; it has been held as follows:

> *“16. It is settled law that the place of residence at the time of the filing of the application under the Act does not help to ascertain whether a particular court has jurisdiction to entertain the*

> *proceedings or not. The moving of minors from one place to another and consequently from one jurisdiction to another does not help the party who raises the plea of jurisdiction. The main question i.e. whether the minors were ordinarily residing in any particular place has to be primarily decided on the facts of the particular case.*
>
> *17. In view of the abovesaid facts and circumstances as explained earlier, I am of the view that the impugned order cannot be interfered with. In view of facts stated in the petition, it is clear that the place where the children have gone to study cannot be presumed to be place of their ordinary residence."*

15. In the case of **Ruchi Majoo** versus **Sanjeev Majoo** reported in **(2011) 6 SCC 479,** the Hon'ble Apex Court has examined the purpose of the expression "ordinarily resident" appearing in section 9 (1) of the Guardians and Wards Act, 1890 and observed as under:

> ***"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 quality, to be vested as a right. (Bowden v. Jensen [359 SW 2d 343 (Mo Banc 1962)] , SW 2d at p. 349.)"*

16. The **Webster's Dictionary** also gives the word "reside" a similar meaning, which may be gainfully extracted as follows:

> *"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."*

17. In the case of **Jagir Kaur** versus **Jaswant Singh** reported in **AIR 1963 SC 1521 : (1963) 2 Cri LJ 413,** the Hon'ble Apex Court while dealing with a case under Section 488 of the Code of Criminal Procedure, 1973 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 said provision and held that "resides" implies 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."*

18. Further, in the case of **Prashant Chanana** versus **Mrs. Seema alias Priya,** reported in **AIR 2010 P&H 99**, it has been observed that Section 9 (1) makes it clear that it is the ordinary place of residence of the minor which determines the jurisdiction of a particular Court to entertain an application for guardianship of the minor. Such jurisdiction cannot be taken away by temporary residence elsewhere at the date of presentation of the challan.

19. Thus, a bare perusal of section 9 (1) of the Guardians and Wards Act, 1890 makes it apparent that it is the ordinary place of residence of 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 petition. The fact that the minor is found actually residing at the place when the application for the guardianship of the minor is made does not determine the jurisdiction of the Court.

20. Coming to the factual matrix of the case, it would be apt to refer to the pleadings made in the application as preferred by the applicant under Order 7 Rule 11 of the Code of Civil Procedure, 1908 before the Court below. In Paragraph 4 of affidavit filed in support of application under Order VII Rule 11 of the Code of Civil Procedure, 1908, the appellant has deposed that the minor is currently residing at House No. 2644, Sector 13, Bhiwani, Haryana for the purpose of pursuing his studies at K.M. Public School (Senior Secondary), Bhiwani, Haryana. Further, in Paragraph No. 5 of the said affidavit, the appellant has stated that the minor is presently residing at House No. 2644, Sector 13, Bhiwani, Haryana and was residing at the same place on the date of filing of the said case. He has further stated that since the minor is not residing within the territorial jurisdiction of the Family Court at Ghaziabad, the respondents/plaintiff has no cause of action against him and the learned Family Court at Ghaziabad has no jurisdiction to entertain the said case.

22. Furthermore, the appellant has also mentioned in Paragraph 3 of the application filed under Order VII Rule 11 of the Code of Civil Procedure, 1908, that the minor is presently residing at House No. 2644, Sector 13, Bhiwani, Haryana for the purpose of education. For a better appreciation of the case, Paragraph 3 of the said application is reproduced hereinbelow:

> *"3. यह कि मास्टर कुंज वर्तमान में के०एम० पब्लिक स्कूल सीनियर सैकेंडरी भिवानी हरियाणा में अपनी पढाई करने के लिये मकान ने0-2644. सैक्टर-3 भिवानी हरियाणा में विपक्षी के पास रहता है। और मकान नं0-2644 सेक्टर 13 भिवानी हरियाणा से ही प्रतिदिन शिक्षा पाने के लिये अपने स्कूल में आता जाता है/"* *(emphasis supplied)*

23. From the description of address of the appellant/defendant as mentioned in the affidavit filed in support of the application under Order VII Rule 11 of the Code of Civil Procedure, 1908, it is evident that House No. 2644, Sector-3, Bhiwani, Haryana is his current address while he mentioned his address as G-133, Sanjay Nagar, Sector-23, Police Station Kavi Nagar, District Ghaziabad. The relevant portion of the affidavit is being extracted below:

> *"शपथपत्र ओर से धीरज पुत्र श्री ओमप्रकाश आयु करीब 35 वर्ष निवासी जी-133 संजयनगर सैक्टर-23, थाना कविनगर जिला गाजियाबाद उत्तर प्रदेश हाल निवासी मकान नं0-2644 सैक्टर-13, भिवानी हरियाणा निम्न प्रकार है/"* *(emphasis supplied)*

24. Moreover, from a perusal of the pleadings, it is crystallised that the appellant himself has admitted that Master Kunj is currently residing at House No- 2644 Sector-13, Bihwani, Haryana for the purpose of pursuing his Education at K.M. Public School (Senior Secondary) along with him.

25. Be that as it may, it is noteworthy that the question of jurisdiction has been challenged by the appellant by way of filing of an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 which provides for rejection of plaint under certain specified conditions. Rule 11 of Order VII of the Code of Civil Procedure, 1908 is extracted below:

> ***"11. Rejection of plaint. -***
>
> *The plaint shall be rejected in the following cases:-*
>
> *(a) where it does not disclose a cause of action;*
>
> *(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;*
>
> *(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;*
>
> *(d) where the suit appears from the statement in the plaint to be barred by any law:*
>
> *(e) where it is not filed in duplicate*
>
> *(f) where the plaintiff fails to comply with the provisions of rule 9*
>
> *Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature form correcting the valuation or supplying the requisite stamp-paper , as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."*

26. In the case of **Kamla and others** versus **KT Eshwara Sa and others,** reported in **(2008) 12 SCC 661,** the Hon'ble Supreme Court has been pleased to observe as under:

> *"21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.*
> *22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision."*

27. It is settled law that for invoking clause (d) of Order VII Rule 11 of the Code of Civil Procedure, 1908, only the averments made in the plaint would be relevant and thus, for this purpose, there cannot be any addition of subtraction. The issue of merits of the matter would not be within the realm of the court as the court at that stage will not consider any evidence or enter a disputed question of fact or law. While dealing with the application under Order 7, Rule 11 of the Civil Procedure Code, 1908, the averments made in the plaint alone are to be seen. It is also trite that jurisdiction is a mixed question of law and fact, and a plaint should not ordinarily be rejected on the ground of jurisdiction, without framing a distinct issue and taking evidence.

28. In the case of **Saleem Bhai and Others** versus **State of Maharashta and Others,** reported in **(2003) 1 SCC 557,** the Hon'ble Supreme Court held that the averments in the plaint are germane and the relevant facts which need to be looked into for deciding an application under Order VII Rule 11 of the

Civil Procedure Code, 1908 are the averments in the plaint. For a ready reference, Paragraph 9 and 10 of the said judgment is quoted hereinbelow,

> *"**9.** A perusal of Order VII Rule 11 C.P.C. makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order VII Rule 11 C.P.C. at any stage of the suit-before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order VII C.P.C. the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order VII Rule 11 C.P.C. cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity. The High Court, however, did not advert to these aspects.*
> ***10.** We are, therefore, of the view that for the aforementioned reasons, the common order under challenge is liable to be set aside and we, accordingly, do so. We remit the cases to the trial court for deciding the application under Order VII Rule 11 C.P.C. on the basis of the averments in the plaint, after affording an opportunity of being heard to the parties in accordance with law."*

29. The Hon'ble Supreme Court in the case of **Srihari Hanumandas Totala** versus **Hemant Vithal Kamat and Others** reported in **(2021) 9 SCC 99**, has been pleased to deal the scope of Order VII Rule 11 of the Code of Civil Procedure, 1908 and has laid down as under:

> *"24. In a more recent decision of this Court in Shakti Bhog Food Industries Ltd. v. Central Bank of India and Another, a three Judge bench of this Court, speaking though Justice AM Khanwilkar, was dealing with the rejection of a plaint under Order 7 Rule 11 by the Trial Court, on the ground that it was barred by limitation. The Court referred to the earlier decisions including in Saleem Bhai v. State of Maharashtra, Church of Christ Charitable Trust (supra), and observed that: (Church of Christ Charitable Trust case, SCC p. 714, para 11)*
>
> > *"11….. It is clear that in order to consider Order 7 Rule 11, the court has to look into the averments in the plaint and the same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into indeciding such an application are the averments in*

> *the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averment. These principles have been reiterated in Raptakos Brett & Co. Ltd. v. Ganesh Property, (1998) 7 SCC 184 and Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express, (2006) 3 SCC 100."*
>
> *25. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) can be summarized as follows:*
>
> *25.1. To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to;*
>
> *25.2. The defense made by the defendant in the suit must not be considered while deciding the merits of the application;*
>
> *25.3. To determine whether a suit is barred by res judicata, it is necessary that (i) the 'previous suit' is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and*
>
> *25.4. Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the 'previous suit', such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused."*

30. The question whether the minor is ordinarily residing at a given place is primarily a question of fact which cannot be decided without an enquiry into the factual aspects of the case. Moreover, the residence by volition or by compulsion within the territorial jurisdiction of the Court cannot be treated as place of ordinary residence. The words "ordinarily resides" are not identical and cannot have the same meaning as residence at the time of filing of the application for grant of custody. The purpose of using the expressions "where the minor ordinarily resides" is perhaps to avoid the mischief that minor may be forcibly removed to a distant place, but still the application for minor's custody could be filed within the jurisdiction of the Court from whose jurisdiction he had been removed or in other words where the minor would have continued to remain but for his removal.

31. In the case of **Ruchi Majoo** versus **Sanjeev Majoo** reported in **(2011) 6 SCC 479,** the Hon'ble Supreme Court while considering section 9(1) of the Guardians and Wards Act, 1890 has held that solitary test for determining

the jurisdiction of the Court under section 9 Guardians and Wards Act, 1890 is ordinary residence of the minor. The expression used in section 9 (1) is "where the minor ordinarily resides". 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 mixed question of law and fact. It has further been held that unless jurisdictional facts are admitted, the question "where the minor ordinarily resides" can never be pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy. (emphasis supplied)

32. In the instant case, the factum of 'ordinary residence' of the minor is a disputed question of fact and thus, the question whether the Court at Ghaziabad has territorial jurisdiction to entertain the petition under Section 25 of the Guardians and Wards Act, 1890 is a mixed question of law and fact. The aforesaid question cannot be determined without holding an enquiry into the factual aspects of the controversy and without framing a distinctive issue in this regard. The scope of scrutiny at the stage of consideration of an application under Order VII, Rule 11 of Civil Procedure Code 1908 is confined only to the averments made in the petition. Thus, the question whether the Court has territorial jurisdiction being mixed question of law and fact cannot be decided by way of an application under Order VII, Rule 11 of the Civil Procedure Code, 1908.

33. In view of the deliberations made in preceeding paragraphs and also the factual matrix of the case, this court is of the considered opinion that the learned Court below has rightly rejected the application filed by the appellant-defendant under Order VII Rule 11 of the Civil Procedure Code, 1908. The present Appeal does not call for any interference by this Court. Accordingly, the same is **dismissed**, being devoid of merits.

34. However, it is made clear that this Court has not expressed any opinion on the merits of the case and the observations in the present judgment are only for the purpose of deciding the present appeal and will have no bearing on the adjudication of the case and/or any other related proceedings. It is

further provided that while deciding the issue of its' territorial jurisdiction, the learned Court below shall not, in any manner, be influenced by the finding recorded by it on the subject regarding the place of residence in the impugned order dated 18.03.2024 and shall decide the same on merit, strictly in accordance with law.

Order Date :- 15.05.2024
Abhishek Gupta