Sunaina Chowdhary Vs Vikas Chowdhary

FAO. No. 3860 of 2011 (O and M)

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: May 2, 2012

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 7 Rule 10, Order 7 Rule 11, 13#Guardians and Wards Act, 1890 â€" Section 25, 9, 9(1)

Citation: AIR 2013 P&H 147

Hon'ble Judges: Hemant Gupta, J; A.N. Jindal, J

Bench: Division Bench

Advocate: Ashok Aggarwal, with Mukul Aggarwal, for the Appellant; R.S. Bains and Narender Pal Bhardwaj, for the Respondent

Judgement

Hemant Gupta, J.
The order impugned in the present appeal is dated 27.1.2011 passed by the learned District Judge, Family Court,

Gurgaon, accepting an application filed by the respondent under Order 7, Rule 11, CPC and rejecting the plaint, inter alia, for the reason that the

Gurgaon Court has no territorial jurisdiction to entertain the plaint. The facts as are necessary to decide the question of territorial jurisdiction of the

Gurgaon Court are that the appellant filed a petition on 12.6.2009 for custody of the minor children, namely, Master Inan aged 4 1/2 years and

Master Ishaan 2 1/2 years u/s 25 of the Guardians and Wards Act, 1890 for short (""the Act""). The marriage between the parties was solemnized

on 17.1.2004 at Gurgaon, in accordance with Hindu rites and ceremonies and two children were born out of the said wedlock. The elder son was

born in October, 2004 and the younger son in August, 2006.

2. The appellant alleged that her signatures were obtained on blank papers and the respondent and his family members hatched a criminal

conspiracy to protect themselves from prosecution in the dowry and other cases and that they shifted the appellant along with her two children to

Auckland (New Zealand). The respondent and his family members started creating false and fabricated medical papers to get declared the

appellant as mentally disturbed lady and on her raising objections, she was kicked out from her matrimonial home. Later, she came back to her

parental home.

3. The respondent, without filing written statement, filed an application under Order 7, Rules 10 and 11, CPC alleging that the appellant has

concealed material facts and also perjured herself on oath by not disclosing the true facts of the case and, therefore, the petition was not

maintainable. It was also pleaded that the Gurgaon Court has no jurisdiction to entertain the present petition in view of the provisions of Section

9(1) of the Guardians and Wards Act, 1890. It was alleged that the appellant-petitioner has changed her statements and made submissions, which

were in conflict with her earlier versions and that the petition has been filed third time on the same grounds and is based on totally false facts, which

have already been established to be misleading and false by the competent Court in New Zealand. It was also averred that the parties have shifted

to Auckland (New Zealand) in March, 2007 and taken permanent abode there. The respondent relied heavily on the proceedings taken before the

New Zealand Court, regarding the custody of the children.

4. The learned Family Court passed a long order running into around 80 pages to hold that the Court has no jurisdiction to try the petition and also

observed that since the appellant herself submitted to the Family Court in New Zealand, therefore, the judgment and order passed by that Court

satisfies the requirement of Section 13 of the CPC. It is the said order, which is the subject matter of challenge in the present petition.

5. Learned counsel for the appellant has vehemently argued that at the time of consideration of an application for rejecting of plaint for want of

territorial jurisdiction, only the averments made in the plaint have to be read and not the averments made in the application under Order 7, Rule 11,

CPC, particularly the documents attached thereto. Reference has been made to Mayar (H.K.) Ltd. and Others Vs. Owners and Parties, Vessel

M.V. Fortune Express and Others, wherein it has been held to the following effect:--

12. From the aforesaid, it is apparent that plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or

in an application for rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if

it does, then the plaint cannot be rejected by the court exercising the powers under Order 7, Rule 11 of the Code. Essentially, whether the plaint

discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those

averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the

material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to

misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires

determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint.

In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has

rightly said that powers under Order 7, Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants.

6. Reliance is also placed upon Hardesh Ores Pvt. Ltd. Vs. Hede and Company,), wherein it has been held to the following effect:

25. The language of Order 7, Rule 11, CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the

suit appears from the statement in the plaint to be barred by any law. Mr. Nariman did not dispute that ""law"" within the meaning of clause (d) of

Order 7 Rule 11 must include the law of limitation as well. It is well settled that whether a plaint discloses a cause of action is essentially a question

of fact, but whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in

their entirety must be held to be correct. The test is whether the averments made in the plaint, if taken to be correct in their entirety, a decree would

be passed. The averments made in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order 7 is applicable. It is not

permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form

that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent

grammatical sense. As observed earlier, the language of clause (d) is quite clear but if any authority is required, one may usefully refer to the

judgments of this Court in Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, and Popat and Popat and

Kotecha Property Vs. State Bank of India Staff Association,

7. Learned counsel for the appellant has vehemently argued that both the children were born in India and are Indian citizens and are staying in New

Zealand on Indian Passports. It is also stated therein that since 9.4.2009, the children are staying with the respondent at his sister''s residence in

Auckland and that since the children are minor, they require care and consideration of the mother.

8. The fact that the children are Indian citizens is not disputed by the learned counsel for the respondent. However, in an application before the

learned Family Court, it was inter alia, asserted that the children are residing at New Zealand till date and the present petition seeking custody of

the minor children is not maintainable in view of Section 9 of the Guardians and Wards Act, 1890.

9. Learned counsel for the appellant has vehemently argued that the question of territorial jurisdiction of the Court is a mixed question of law and

fact and that the fact that the children are Indian citizens, being not in dispute, one or the other competent Court in India, will have the jurisdiction

regarding the custody of the children. The stay of the children with their father''s sisters, is a temporary arrangement and cannot be said to oust the

jurisdiction of the Indian Courts. It is contended that whether the appellant is entitled to any relief or not, will have to be decided after the evidence

is led by the parties whereas the interim relief is to be granted on the basis of the pleadings and documents produced. It is contended that the

appellant-petitioner cannot be non-suited at the threshold without permitting the parties to lead evidence in support of the contentions raised as

none of the grounds for rejection of the plaint are available to the respondent.

10. At this stage, it will be relevant to reproduce Section 9 of the Guardians and Wards Act, 1890 and Order 7 Rule 11 of the Code of Civil

Procedure:

Section 9(1) of the Guardians and Wards Act, 1890.

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.

XXXX

Order 7, Rule 11, CPC

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 under-valued, and the plaintiff, on being required by the Court to so 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 written 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-papers 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 from correcting the

valuation or supplying the requisite stamp-papers, 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.

11. It appears that the claim of the respondent for rejection of the plaint is said to be falling within the scope of clauses (a) or (d) of Order 7, Rule

11, CPC. Apart from the judgments referred to above, which unmistakably and unequivocally state that the averments in the plaint as a whole have

to be read to determine whether any of the grounds for rejection of the plaint is made out, it appears that Clause (d) itself postulates that the plaint

can be rejected where on the basis of the averments made in the suit, it appears to be barred by law.

12. A reading of the plaint does not show that the suit is not maintainable before the Gurgaon Court or it does not disclose any cause of action.

Since the children are Indian citizens, Courts in India will have jurisdiction as an Indian citizen, the minors are subject to the jurisdiction of the

Indian Courts. There can be some dispute as to whether the Gurgaon Court has jurisdiction or not, but it cannot be said that none of the Indian

Courts will not have jurisdiction. Since, the children were born at Gurgaon and last resided at Gurgaon before leaving for New Zealand, therefore,

Gurgaon Court is the most appropriate court to exercise jurisdiction in respect of the custody of the minor children in India. The stay of the children

at New Zealand as Indian citizens is only a temporary arrangement and does not oust the jurisdiction of Indian Courts.

13. In Dr. V. Ravi Chandran Vs. Union of India (UOI) and Others, , the child in question was an American citizen and the father wanted his

custody from his mother, who was in India. It was held by the Court to the following effect:

29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court

where the parties had set up their matrimonial home, the court in the country to which the child has been removed must first consider the question

whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return

custody of the child to the country from which the child was removed and all aspects relating to the child''s welfare be investigated in a court in his

own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and

happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving

and understanding care and guidance and full development of the child''s character, personality and talents. While doing so, the order of foreign

court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each

case.

30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the

jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the

court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best

interests of the child. The indication given in Mckee v. Mckee, 1951 AC 352 that there may be cases in which it is proper for a count in one

jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the

care of the child on the ground that such an order is in the best interests of the child has been explained in L (Minors): In re, (1974) 1 WLR 250

and the said view has been approved by this Court in Dhanwanti Joshi Vs. Madhav Unde, . Similar view taken by the Court of Appeal in H.

(Infants): In Re, (1996) 1 WLR 381 ,has been approved by this Court in Mrs. Elizabeth Dinshaw Vs. Arvand M. Dinshaw and Another,

14. In a recent judgment reported as Parshant Chanana Vs. Mrs. Seema alias Priya, it has been held by a single Judge of this court that the

permanent residence is an elastic word of which the exhaustive definition cannot be given. It was held to the following effect:--

12. Section 9(1) makes it clear that it is the ordinary place of residence of 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 (plaint sic). The term "residence" is an elastic word of which an exhaustive definition cannot be given. It is differently construed

according to the purpose for which enquiry is made into meaning of the term. The sense in which it should be used is controlled by reference to the

objector. A reasonable meaning of "residence" would mean dwelling in a place for some continuous time. The word "ordinarily resides" in sub-

section 1 means mere a temporary residence, even though, it will be of such temporary residence may be considerable. Word ordinarily resides

would mean a regular, normal, a settled home or a regular place of abode, which can be distinguishable from a temporary or a forced stay. If a

minor child has been removed either by stealth or by compulsion and kept at a different place than the house of a natural born, the same cannot be

said to be a place where the child "ordinarily resides". The respondent has in her petition for the custody of the child specifically mentioned and

actually admitted that the child has been taken to Lucknow. She also explained the circumstances that the child had been snatched from her when

she was residing at Mohali, where the couple had shifted after three years of marriage.

15. The objection raised by the appellant-petitioner that the order produced by the respondent of the New Zealand Court is not a certified copy or

that the order is not binding for the reason that it is based upon error of law and fact, need not be examined at this stage. The only question to be

examined is whether the Gurgaon Court has the territorial jurisdiction keeping in view the provisions of law and fact, and we hold that the I Indian

Courts, Gurgaon has the jurisdiction in respect of the minors. In view of the above, the impugned order dated 27.1.2011 passed by the learned

Family Court is set aside. The parties through their counsel are directed to appear before the learned Family Court on 28.5.2012 for further

proceedings in accordance with law. The respondent shall file his written statement on the said date. If the same is not filed, his defence will be

deemed to be struck of. The learned Family Court shall conclude the proceedings expeditiously, preferably by the end of December, 2012 and if

necessary by conducting day-to-day proceedings.