# Smt. Ayeesha M. Torgal Vs Sri. B. Pradeep Muthukumar

**Court:** Karnataka High Court

**Date of Decision:** June 3, 2013

**Acts Referred:** Guardian and Wards Act, 1890 â€" Section 25, 6, 9
Hindu Minority and Guardianship Act, 1956 â€" Section 2

**Citation:** (2013) 3 AKR 766 : (2013) ILR (Kar) 3366 : (2013) 3 KCCR 2359

**Hon'ble Judges:** N. Kumar, J; B. Sreenivase Gowda, J

**Bench:** Division Bench

**Advocate:** Ashok Patil, for the Appellant; V.V. Gunjal, for the Respondent

**Final Decision:** Dismissed

## Judgement

N. Kumar, J.
This appeal is filed challenging the order passed by the Family Court dismissing the petition filed tinder Section 25 of the

Guardian and Wards Act, 1890 (for short "Act of 1890") on the ground it has no territorial jurisdiction to entertain the petition. The appellant-

Smt. Ayeesha M. Torgal was married to the respondent Sri B. Sri. B. Pradeep Muthukumar on 5th February, 2010 as per Hindu rites, their

marriage was registered under the Special Marriage Act on 30.2.2009 before wedding ceremony. A male child was born to them on 24.03.2011

at Statement, Pierre hospital, Brussels, Belgium. After the birth of the child differences arose between the couple. The respondent initiated divorce

proceedings in the Court of 1st instance of Belgium Brussels. Petitioner entered appearance. An interim order came to be passed on 31.01.2012

restraining the appellant from removing the child from Brussels pending disposal of the divorce proceedings. Ultimately divorce petition was

allowed. On 9.2.2012 petitioner left Belgium. On her return to India she presented this petition for declaring her as guardian of her minor son.

After service of notice respondent filed statement objections contesting the claim. He contended that as the child was born at Belgium and was

residing at Belgium before the appellant left Belgium and the child continues to reside in Belgium, Court of Bangalore has no territorial jurisdiction

to entertain the petition.

2. Both the parties have addressed arguments, relied upon several judgments as well statutory provisions. On consideration of the aforesaid

material, the Family Court has held that the child is not residing within the jurisdiction of the Family Court it has no jurisdiction to entertain the

petition. Accordingly the petition came to be dismissed. Aggrieved by the said order the present appeal is filed.

3. Sri Ashok Patil, learned Counsel for the appellant assailing the impugned order contends that though Section 9 of Act of 1890 provides the

District Court having jurisdiction where the minor ordinarily resides has to be read with Section 6(a) of the Hindu Minority and Guardianship Act,

1956 which provides that the custody of minor child not completed the age of 5 years ordinarily with the mother and therefore he submits as the

mother is residing within the jurisdiction of the Family Court, it has jurisdiction to entertain the petition. He also relied upon the judgment of this

Court in the case of K.C. Sashidhar Vs. Roopa, where the word ""originally resides"" came for interpretation.

4. Per contra, Sri V.V. Gunjal, learned Counsel for the respondent submits Section 9 of Act of 1890 emphasis only the Court where the child

originally resides has jurisdiction. Section 2 of the Hindu Minority and Guardianship Act, 1956 makes it clear the provisions of the said Act shall be

in addition to Act of 1890 and therefore in the entire scheme of the Act the Court having jurisdiction to entertain the application has not been

provided for. Section 6(a) operates totally in a different sphere. In this regard he relied upon the decisions of the Allahabad and Kerala High

Courts.

5. The facts are not in dispute. The marriage was celebrated at Madras. Even before marriage, it was registered under the Special Marriages Act.

After marriage the couple have gone to Belgium and in Belgium a child was born. After birth of the child divorce petition was initiated by the

respondent. Copy of the petition was duly served on the respondent. During pendency of the divorce petition an interim order came to be passed

restraining the appellant from removing the child from Belgium. Therefore the child continues to reside in Belgium. Now the divorce petition is

allowed. In the meanwhile appellant left Belgium and she is residing at Bangalore. Because of the interim order passed she could not take the child

along with her to Bangalore. On the date of petition for appointment of guardian was filed in the Family Court at Bangalore child was not with her.

It is in this back ground it is necessary to see Section 9 of Act of 1890 which 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 he

made to the District Court having jurisdiction in the place where the minor ordinarily resides.

6. Section 6(a) of the Hindu Minority and Guardianship Act, 1956 of which reliance is placed which reads''s under:

6. Natural guardians of a Hindu minor:- The natural guardian of Hindu minor, in respect of the minor''s person as well as in respect of the minor''s

property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl - the father, and after him, the mother: provided that the custody of a minor who has not completed the

age of five years shall ordinarily be with the mother,

Section 6(a) speaks about who is the competent person to be guardian of a Hindu minor and who is the competent person in whose custody of a

minor child aged about 5 years is to be kept, it does not deal with the Court having jurisdiction to entertain an application.

Section 2 of the Hindu Minority and Guardianship Act, 1956 reads as under:

2. Act to be supplemental to Act 8 of 1890.- The provision of this Act shall be in additional to, and not, save as hereinafter expressly provided, in

derogation of, the Guardian and Wards Act, 1890 (8 of 1890).

7. Therefore, all the provisions of Act of 1890 are made applicable to a Hindu Minor under the Act except to the extent where a specific

provisions are made in the Act. In the Act of 1956 there is no provision stipulating the Court having jurisdiction to entertain application. Section 9

of Act 1890 provides the Court having jurisdiction to entertain an application. Therefore Section 9(1) of Guardianship Act has to be read with the

provisions of Act, 1956 in total. Once a petition is filed before a competent Court for appointment of guardian to a minor, then Section 6(a) comes

into operation, who is to be appointed as guardian when minor child is below the age of 5 years, is provided therein. It does not deal with the

jurisdiction of the Court. In this background we have to consider the judgment of this Court in the case of K.C. Sashidhar cited supra interpreting

the word ""originally resides"" in Section 9(1) of Act of 1890. Para 4 reads as under:

Invariably, a minor child that too at the age of 10 to 11 months is expected to be with the custody of the mother. So the words ""ordinarily resides

should be construed as the place where the mother resides before the presentation of the Petition. It is an admitted fact that, in the instance, the

mother was residing at Mysore when she presented the Petition at Mysore seeking custody of the child. Further, it is to be noted that she has

alleged in her Petition circumstances under which the child was forced for be left in the custody of the father. When such is the case, the place of

residence has to be construed as the place where mother resided before presenting the Petition. In view that, the finding given by the Court below

that the Petition filed by the petitioner, namely the mother, at Mysore having jurisdiction does not suffer from any legal infirmities.

8. It is clear from para 2 of the said judgment where the facts are set out, the wife along with her child went to Bombay to reside with her husband,

after the birth of the child. While she was living at Bombay with her husband, she was driven out of the house along with her mother and the

custody of the child was not given to her as such the circumstances warranted her to seek the intervention of the Court for the custody of the child.

In those circumstances as the husband has taken law in to his hands and driven out the wife from the house along with her child aged about 10 to

11 months, the Court held that the Court at Mysore where the wife was residing immediately before presentation of the petition had jurisdiction. In

the instant case the child was born at Belgium and in the custody of the parents. The father filed a petition for divorce. Apprehending the mother

may take away the child to India, he moved the Court at Belgium for restraining the mother from taking the child out of Belgium and an order came

to be passed. It is thereafter she left Belgium to India. Subsequently an order of divorce came to be passed. Under these circumstances, no blame

could be put on the doors of the husband. Therefore in the facts and circumstances of this case, it is not possible to accept the aforesaid

interpretation. The Court at Bangalore where the wife is residing presented the petition has no jurisdiction. The child has not seen India at all or

born in India. He was born at Belgium, residing at Belgium on the date of presenting the petition. Therefore, the finding of the Family Court that it is

has no jurisdiction to entertain the petition is legal and valid and it does not call for interference. We do not see any merit in the appeal.

Accordingly the appeal is dismissed.