

IN THE HIGH COURT OF JHARKHAND AT RANCHI
(Civil Appellate Jurisdiction)

FA No. 167 of 2017

Jyoti Das, wife of Avijit Das, resident of House No.14, Zone No.4, near Shiv Mandir, Birsa Nagar, PO & PS Birsa Nagar, Town Jamshedpur, District Singhbhum East Applicant/Appellant

Versus

Avijit Das, son of Shri Narayan Das, resident of Tinplate Quarter near Tinplate Hospital, PO & PS Golmuri, Town: Jamshedpur, District East Singhbhum Respondent/Respondent

**CORAM : HON'BLE MR. JUSTICE SHREE CHANDRASHEKHAR
HON'BLE MR. JUSTICE RATNAKER BHENGRA**

For the Appellant : Mr. Vishal Kumar Tiwary, Advocate;
Mr. S.M. Mudassar Nazar, Advocate
For the Respondents : Mrs. Vandana Singh, Advocate

O R D E R
31st March 2022

Per, Shree Chandrashekhar, J.

Guardianship Case No. 576 of 2015 was instituted by the mother of Arijita Das seeking appointment as legal guardian of her daughter.

2. In her petition filed under section 7 read with section 17 of the Guardians and Wards Act, 1890, Jyoti Das averred that she gave birth to Arijita Das on 4th November 2004. Her daughter subsequently came in custody of her husband who sent her to Delhi where her daughter started residing with her uncle. Later in time, she started a beauty parlour for her livelihood and now being capable of taking care of her daughter she wanted that she should be appointed legal guardian of her daughter. She further averred that her husband was suffering from liver cancer and he tried several times to kill her. In one of the cases, her husband was arrested by the police and sent to judicial custody. She alleged that her husband had immoral relations with other ladies and was not taking care of the daughter. There are various allegations levelled by the wife against her husband on the basis of which she pleaded that her daughter must remain in her company by appointing her legal guardian of Arijita Das.

3. The petition was presented for registration on 22nd December

2015 and an application under Order VI Rule 17 of the Code of Civil Procedure (in short 'CPC') read with section 151 CPC was filed for incorporating the following facts under paragraph No.3A:

"3A. That the daughter of the applicant namely Arijita Das was taken birth at Mercy Hospital, Jamshedpur and she was lastly in custody of the applicant on 06.09.2008 of H. No. 14, Zone No.4, Birsa Nagar, Jamshedpur and she lastly met with the applicant on 07.02.2015 at Civil Court Campus, Jamshedpur by order of the learned Court in connection with Misc. Case No. 33/2011 in presence of one Bharti Banerjee and Sanjay Kumar Das."

4. Guardianship Case No. 576 of 2015 was posted for admission before the Principal Judge, Family Court, Jamshedpur and by an order dated 6th February 2017 the suit was posted for hearing on the point of admission on 14th February 2017. The order dated 14th February 2017 records that the Court heard the counsel for the petitioner on the issue of jurisdiction (maintainability). The Principal Judge, Family Court, Jamshedpur proceeded to take note of the judgment of the Hon'ble Supreme Court in "*Ruchi Majoo v. Sanjeev Majoo*" (2011) 6 SCC 479 wherein the Hon'ble Supreme Court has held that the test for determining the jurisdiction is the ordinary place of residence of the minor and "intention" to make that place one's ordinary abode has to be looked into. The Principal Judge, Family Court, Jamshedpur, after recording that the minor child lived with her mother only for four years at Jamshedpur and for the larger part of her life she was at Delhi with her uncle came to form an opinion that the Court at Jamshedpur has no jurisdiction to entertain the petition under section 7 of the Guardians and Wards Act, 1890.

5. By an order dated 20th February 2017, Guardianship Case No. 576 of 2015 was dismissed on the ground that the Family Court, East Singhbhum at Jamshedpur has no jurisdiction to entertain the suit in terms of section 9 of the Guardians and Wards Act, 1890. The suit was dismissed with liberty to the applicant to file a "fresh suit" in the Court having jurisdiction under section 9 of the Guardians and Wards Act, 1890.

6. The appellant has challenged the aforesaid judgment dated 20th February 2017 passed in Guardianship Case No. 576 of 2015 on the ground of judicial impropriety – amongst other grounds.

7. We have perused the lower Court records and find that procedural irregularities were committed by the Court while dealing with

Guardianship Case No. 576 of 2015. The proceedings in the said case disclose that an application for amendment was filed on 2nd June 2016 which was posted for hearing on several dates and finally by an order dated 23rd January 2017 the said application was allowed. We are quite surprised to see that in the order dated 23rd January 2017 itself the Family Court Judge has recorded that amendments were not carried out – presumably in the petition. Order VI Rule 18 CPC provides that if a party who obtained an order for amendment does not amend accordingly within the time limited for the purpose by the order, or if no time is limited then within 14 days from the date of the order, he shall not be permitted to carry out the amendments. By the order dated 23rd January 2017 no time was fixed by the Court for carrying out the amendments and before expiry of 14 days from such date the Court had no occasion to record such remark. This is one example which shows the casual manner in which the Family Court Judge approached the custody case.

8. Secondly, Guardianship Case No. 576 of 2015 was dismissed on the ground of jurisdiction but with liberty to the applicant to institute “a suit afresh”.

9. Order VII Rule 10 CPC which deals with return of plaint provides that the plaint shall at any stage of the suit be returned to be presented in the Court in which the suit should have been instituted. Order VII Rule 10 sub-rule (2) CPC provides that on returning a plaint the Judge shall endorse thereon both the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it. There is no doubt that except to the extent special procedures are prescribed under the Guardians and Wards Act, 1890 or the Family Courts Act, 1984, the procedure prescribed by Rule 10 to Order VII CPC shall apply in this case. The provisions under Order VII Rule 10 sub-rule (1) CPC do not provide that a fresh petition is required to be filed in the Court in which the application should ordinarily be presented. Still, the Family Court Judge, Jamshedpur while dismissing Guardianship Case No. 576 of 2015 directed the applicant to institute a fresh suit.

10. As regards the issue of jurisdiction, we may observe that the issue of territorial jurisdiction is generally decided after taking evidence in this regard. Section 9 of the Guardians and Wards Act, 1890 deals with jurisdiction of the Court to entertain application with respect to the

guardianship of the minor. It provides that the application with respect to the guardianship of the person of the minor is to be made to the District Court having jurisdiction in the place where the minor ordinarily resides. Except in exceptional cases in which on the basis of the averments in the plaint/petition without any labor or strenuous and extensive exercise it can be concluded that the Court has no territorial jurisdiction to entertain the petition, the plaint cannot be returned under Order VII Rule 10 CPC. The learned counsel for the appellant would contend that on a bare reading of the averments in the petition it cannot be conclusively concluded that the Family Court, Jamshedpur has no jurisdiction to entertain the Guardianship Case No. 576 of 2015.

11. As would appear from the proceedings in the present First Appeal, the learned counsels appearing for both the parties were granted opportunity to inspect the records because in course of hearing we found that several facts which are not borne from the pleadings before the Family Court, Jamshedpur are recorded in the order dated 20th February 2017.

12. The Principal Judge, Family Court, Jamshedpur has written about the orders of the High Court the reference of which we do not find in the petition under section 7 of the Guardians and Wards Act, 1890 or the application filed under Order VI Rule 17 CPC.

13. The Principal Judge, Family Court, Jamshedpur has recorded the following facts in the judgment dated 20th February 2017:

“.....As per the orders of the Hon'ble High Court the child had appeared before the court and after interrogating the child as well as allowing the parents to interrogate with the child the present applicant willfully consented not to take child with her considering it to be not the proper time where child is required to reside with her mother during her holidays.....”

14. We further find that after the judgment was delivered in Guardianship Case No. 576 of 2015 the Principal Judge, Family Court, Jamshedpur has written the order dated 5th November 2018/ 16th November 2018 and that too with respect to another case *vide* FA No. 167 of 2017.

15. The said order 5th November 2018/ 16th November 2018 reads as under:

“05/11/18/ 16/11/18

माननीय झारखण्ड उच्च न्यायालय के द्वारा मूल वाद F.A No.167/17 मे मांग की गई है, उपरोक्त अभिलेख की मांग Memo No.7040-A दिनांक 02.11.18 के द्वारा की गई है। कार्यालय शीघ्र अभिलेख भेजें। ”

16. The matter decidedly pertains to judicial discipline and propriety.

17. Legal Thesaurus by Burton at page 902 said that the meaning of 'propriety' can be assigned to it being 'justice'. Oxford English Dictionary Vol.-VIII, page 1484 sets out the meaning of 'propriety' as "fitness; appropriateness; aptitude; suitability; appropriateness to the circumstances or conditions, conformity with requirement; rule or principle, rightness, correctness, justness etc".

18. Recording of some facts beyond the pleading of the parties and that too in respect of which there is no reference either in the order sheet or the arguments raised on behalf of the parties would definitely touch upon propriety of writing such facts in the judgment. It is really immaterial whether FA No.167 of 2017 was pending in the same Court or that the Family Court Judge had an occasion in the past to deal with some case between the same parties. The recording of facts which are not pleaded in the petition under section 7 r/w section 17 of the Guardians and Wards Act, 1890 is not permissible under any circumstance and by recording the facts beyond the pleadings the Court demonstrated its bias in the lis pending before it – though, may not be in favour of or against a party to the suit. We do not know any law of procedure or atleast have not been shown any law in this regard by the learned counsels appearing for the parties under which we can approve the procedure adopted by the Family Court Judge.

19. In the aforesaid facts, we are constrained to observe that the judgment in Guardianship Case No. 576 of 2015 is vitiated on account of judicial impropriety committed by the Family Court Judge and, accordingly, the order dated 20th February 2017 passed in Guardianship Case No. 576 of 2015 by the Principal Judge, Family Court, Jamshedpur is set-aside. The matter is remitted back to the Principal Judge, Family Court, Jamshedpur for *de novo* consideration.

20. FA No. 167 of 2017 is allowed.

(Shree Chandrashekhar, J.)

(Ratnaker Bhengra, J.)