

IN THE HIGH COURT AT CALCUTTA  
CIVIL REVISIONAL JURISDICTION  
APPELLATE SIDE

B E F O R E :

**The Hon'ble Justice SAHIDULLAH MUNSHI**

**C.O. No. 622 of 2019**

**With**

**C.O. No. 1094 of 2019**

Dipika Agarwal @ Dipika Khaitan

... Petitioner

-Versus-

Rishi Agarwal

... Opposite Party

Mr. Shaktinath Mukherjee ...Sr. Advocate

Mr. Joydeep Kar ...Sr. Advocate

Mr. Swapan Banerjee

Mr. Siddharta Banerjee

Mr. Kunal Ganguly

... For the petitioner

Mr. S.K. Kapoor ...Sr. Advocate

Mr. Saptangshu Basu ...Sr. Advocate

Mr. Aniruddha Chatterjee

Mr. Ayan Kumar Boral

... For the Opposite Party

Heard on : 18.02.2019, 04.04.2019, 11.06.2019 & 18.06.2019.

Judgment on : July 4, 2019

**Sahidullah Munshi, J.:-**

This is an application by the mother of the minor girl child, Sambhuti Agarwal under Section 24 of the Code of Civil Procedure seeking transfer of Act VIII case no.17 of 2019 filed by the father, now pending before the learned District Judge, South 24-Parganas at Alipore and has allegedly for the best interest and welfare of the minor. From the plaint of Act VIII case no.17 of 2019 filed on 5<sup>th</sup> February, 2019 by the father under Section 25 of the Guardians and Wards Act, 1890 read with Section 6(a) of the Hindu Minority and Guardianship Act, 1956, it appears that the father has made out a case that the girl child, Sambhuti Agarwal, was born on 23<sup>rd</sup> October, 2013 out of the wedlock between the husband and his wife. In the plaint the father/petitioner has made out a case that sometime in May, 2017, the wife/opposite party went to her parental house when the petitioner and his family members were unwilling to send the child along with the opposite party/wife in view of her alleged mental disorder. But, however, the opposite party took the child with her against the will of the petitioner and his family members stating that her parents wanted to meet the said child. The petitioner has stated that after the child was taken to the parental house of the opposite party/wife at Mallarpur in Birbhum District, the opposite party/wife left the child alone unattended and since the mother/petitioner was not vigilant enough for the child, the child met a severe accident. It is further alleged that the opposite party consulted a local doctor who prescribed pain killers to the small child and in respect thereof, a copy of the prescription of the doctor at Birbhum dated 27<sup>th</sup> May, 2017 has been annexed to the said plaint. It

is the further case of the petitioner that after coming to know of the said incident he immediately rushed to Mallarpur, District Birbhum and at the first sight of the swollen elbow of his daughter understood that she had suffered a fracture in the left hand. He immediately brought his daughter to Kolkata and consulted good orthopaedic doctor and got the relevant tests done. It was found that the child had suffered a severe fracture of the left elbow, leading to dislocation of bone. The child was admitted in Apollo Gleneagles Hospital where an operation was held on 28.05.2017 under general anaesthesia. The opposite party has also brought on record the medical reports regarding consultation of doctor of Apollo Gleneagles Hospital, Kolkata and the discharge summary being Annexure "D" to the said plaint. It is the further case of the opposite party that he got the child admitted being an alumnus of the school having considerable repute, namely, La Martiniere School for boys. The opposite party got his daughter admitted in the La Martiniere School for girls. Documents annexed to the plaint reveal that the petitioner was in the school for the sessions 2018-19.

Mr. Mukherjee learned Senior Advocate appearing for the husband/opposite party, however, producing a document in original, submits that his client's daughter was attending the school till December, 2018 but school communicated to him that the child was not attending the school since January, 2019. Records produced before this Court reveal that the child was admitted in La Martiniere School for girls on 20<sup>th</sup> June, 2016 and she attended the school last on 14<sup>th</sup> December, 2018.

Learned counsel appearing for the petitioner/mother, submits that the child is only of 5 years of age and it is not possible for her to continue her study in La Martiniere School where it is the admitted position that the petitioner has left matrimonial home at Calcutta and shifted to her parental house at Mallarpur. According to his client's estimation, the girl child has been admitted in a school of repute and the opposite party need not worry about the future of the child. Learned counsel submits that if the child is kept not with the mother, it will be more injurious for the child concerning her mental health than the prospect of education. Therefore, learned counsel submits that if the father is duly concerned with the welfare of the child, he should sacrifice for the interest of the child and allow her to be retained by the mother and should not pray for custody of the child. Learned counsel further submits that there are criminal cases and counter criminal cases both by the wife's side and the husband's side and some of such cases are pending in the district of Birbhum. Therefore, he submits that the husband has to attend those cases in the district of Birbhum and, therefore, there is no reason for the opposite party/husband to oppose his client's prayer for transfer of the Act VIII case to the Court of Birbhum. He further submits that it is the child who will be the worst sufferer if the Act VIII case is kept in Alipore jurisdiction. For all practical purposes, the child has to do her schooling at Mallarpur in the district of Birbhum, staying with her mother at Mallarpur. Therefore, he submits that his prayer for transfer of the Act VIII case should be allowed. In support of such contention Learned Counsel has relied on a decision in the case of **K.C. Sashidhar – Vs. – Roopa**, reported in **AIR 1993**

**Kar 120.** In the said decision a Hon'ble Single Judge, while dealing with a petition for transfer of a custody matter, held that the word 'resides' in the Statute must be the actual place of residence and not a local or constructive residence. The learned Judge has also clarified that this should not connote the place of origin and it should be the actual residence of the wife at the commencement of the proceeding that had to be considered, for jurisdiction. The child's custody was in question was about 10 to 11 months and Court held it was accepted that her custody should be of the mother. Therefore, Court held that the words and expressions "ordinarily resides" should be construed as the place where the mother resides before the presentation of the petition. The Court held that the place where the mother resided before the custody matter was initiated would be the Court having jurisdiction to entertain the application.

Learned counsel has also relied on a decision in the case of **Ruhi Sahina – Vs. – Syed Masidur Rahman**, reported in **(2018) 4 CHN 379** of which I am the author. In the said decision he has relied on the interpretation of the words "ordinarily resides" as mentioned in Section 9(1) of the Guardians and Wards Act, 1890. From the fact narrated in the said decision it appears that it was admitted (emphasis given by me) by the father/opposite party in his application that the minor child was residing with his mother and having regard to such admission this Court held that it would be on such admission of the place where the minor was residing, the Court would have jurisdiction. Here, in this case, no such admission is available that the minor child was residing with the mother at Mallarpur on the day when the application was filed.

To resolve the dispute certain dates are very much important those are as follows :

- 23.10.2013 – Child Born;
- 26.06.2016 – Admitted in La Martiniere School;
- 14.12.2018 – Attended last in La Martiniere School;
- 15.01.2019 – Admitted in St. Paul’s School, Rampurhat;
- 05.02.2019 – Act VIII case no. 17 of 2019 was filed;
- 15.01.2019 - La Martiniere School reopened after Christmas vacation but child did not attend the school.

It is undisputed that the plaint for custody in Act VIII case no.17 of 2019 was filed on 5<sup>th</sup> February, 2019. On an application filed by the husband, an order of injunction was granted by the Court below on 5<sup>th</sup> February, 2019 whereby the learned District Judge passed the following order :

*“Accordingly, by an order of ad-interim injunction the opposite party is restrained from taking transfer certificate of the child from La Martiniere School to any other school till 5.3.2019.*

*Issue notice to the opposite party directing her to show cause by 5.3.2019 as to why the application u/s 12 of the Guardians and Wards Act shall not be granted in favour of the petitioner.”*

Learned counsel submits that the child was admitted in St. Paul's, Rampurhat on 15.01.2019. Therefore, before the order of injunction was passed the child got admission in the District of Birbhum. It is undisputed fact that the petitioner/mother was ordinarily residing temporarily with her father Dipchand Khaitan at South City Residency, 375, Prince Anwar Shah Road, Tower III, Flat No. 5B, Jadavpur, Kolkata – 700068. He submits that since the petitioner for an unavoidable circumstance had to leave the said premises and has permanently shifted to Mallarpur in the district of Birbhum, Act VIII case which was initiated before the District Judge at Alipore, should now be transferred to the district Court within whose jurisdiction the minor child is allegedly residing with the mother. According to him, if this petition is not allowed, the child will be separated from the mother.

Mr. Kapoor, learned Senior Counsel for the opposite party submits that there is no logic for the petitioner to take the child from a school of really good repute (La Martiniere for girls) to a school at Rampurhat. He submits that the welfare of the child is the paramount consideration in a case of this kind.

Question arises where an Act VIII case is to be filed? According to the Statute, an Act VIII proceeding is to be lodged before the District Judge within whose jurisdiction the minor ordinarily resides. 5<sup>th</sup> February, 2019, when the custody was sought for and the Act VIII proceeding was filed before the District Judge at Alipore, according to the learned counsel, the minor was residing at a place within the jurisdiction of Alipore Court, that is, Prince Anwar Shah Road.

Therefore, there cannot be any illegality in filing the Act VIII case in the Court at Alipore but from the submission made by the learned counsel for the petitioner that the child was not in Kolkata when the proceeding was initiated before the Alipore Court.

From the petition under Section 24 of Code of Civil Procedure filed by the wife/petitioner it appears that she has made out a ground for transfer of the instant Act VIII case no. 17 of 2019 filed on 5<sup>th</sup> February, 2019 for her inconvenience to attend the Court at Alipore inasmuch as to attend such custody matter she has to travel more than 225 kilometres from her present place of residence at Mallarpur in the district of Birbhum. The other ground for seeking transfer is that Mallarpur P.S. Case No. 29 of 2019 dated 30<sup>th</sup> January, 2019 is pending at Rampurhat Court where the opposite party has to attend. Therefore, according to her Act VIII case may also be transferred to the Court at Birbhum.

From the Application for custody of the minor daughter under Section 25 of the Guardians and Wards Act, 1890 read with Section 6(a) of the Hindu Minority and Guardianship Act, 1956 appearing at page 119 of the application under Section 24, it appears that the father/opposite party made out a case that the petitioner herein forcibly took the minor daughter with her despite protest and objection of the opposite party and his family members. It has been stated by the opposite party in the said application that his daughter was attending 'La Martiniere School' till the middle of December, 2018. However, after the school closed for Christmas vacation the petitioner took the minor daughter and shifted

to her parental house at Mallarpur in the district of Birbhum. Because of such shifting of the residence of the petitioner from Kolkata to Mallarpur the minor daughter could not attend school after it reopened on 15<sup>th</sup> January, 2019. According to the petitioner her stay at the matrimonial home at Kolkata was terminated by the opposite party on and from 24<sup>th</sup> November, 2018 but with regard to her daughter's attending the school at Kolkata till closing of Christmas vacation the petitioner says that a few days after her termination from the matrimonial home, the daughter attended the school with her grand-mother for a few days (emphasis given by me) as has been stated in the reply of the mother/petitioner to the affidavit-in-opposition filed by the opposite party to Section 24 application. It is not clarified as to how the daughter could attend the school even after the petitioner left the matrimonial home on 24<sup>th</sup> November, 2018 and further while she denied her stay at Flat No.5B, Tower III, 375, Prince Anwar Shah Road, Kolkata-700068. However, she says that even the child attended the school with her grand-mother for few days does not mean that she has got a permanent residence at Kolkata to contest the case at Alipore Court. In the rejoinder filed by Rishi Agarwal a categorical statement has been made stating that his daughter attended school till closed for winter vacation and the petitioner stayed at the south city flat. This fact has not been denied by the petitioner. In her reply affirmed on 14<sup>th</sup> June, 2019 the petitioner has annexed a document purportedly issued by 'St. Paul's School' showing admission of child in Class UKG on 15<sup>th</sup> January, 2019. She has also annexed a document being R-1 at page 9 which shows payment of a sum of Rs.20,200/- on various heads

including admission fee but nothing has been disclosed in the said document about the name of the child, class, admission number. Date of admission has also not been disclosed. The name of the school in the said document appears to be 'St. Paul's International School, Munsuba'. Logo appearing on the said two documents also are not identical. The second document does not disclose any date, as a result a suspicion arises firstly, about the genuineness of the admission on the basis of those two documents and the date when, if at all, such admission has been granted by the school. It is undisputed that on 5<sup>th</sup> February, 2019 when Act VIII case was filed the opposite party moved an application for *ad interim* injunction and Court granted an order on 5<sup>th</sup> February, 2019 itself.

By the said order the learned District Judge, Alipore, restrained the present petitioner (Dipika Agarwal nee Khaitan) from taking transfer certificate of the child from 'La Martiniere School' to any other school till 5<sup>th</sup> March, 2019. By the said order this petitioner was also directed to show cause by 05.03.2019 as to why the application under Section 12 of the Guardians and Wards Act, 1890 shall not be granted in favour of the opposite party (Rishi Agarwal). Undisputedly, the said order was never challenged nor any application was made for vacating the same. In the written statement it has been stated by the opposite party that the application under Order XXXIX Rules 1 and 2 of Code of Civil Procedure was served upon the petitioner and on receiving the same the petitioner herein affirmed the present petition on 14<sup>th</sup> February, 2019 without making any endeavour to appear before the Court of the Learned District Judge at Alipore. The disclosure made by the petitioner in her affidavit that the child was admitted

allegedly in 'St. Paul's School' does not appear to be *bona fide* as a natural course of action. The act is tainted with *mala fide* to create jurisdiction of Court at Mallarpur at the cost of the invaluable future of minor Sambhuti which may not be realized by anyone but the mother should have. The petitioner has disclosed the application under Order XXXIX Rules 1 and 2 in her petition under Section 24 but it has not made any whisper as to its fate, save and except ground no.1 where she has stated that she was not in a position to attend the Court at Alipore.

Learned counsel for the petitioner has submitted that having regard to the provision of Section 9 of the Guardians and Wards Act, 1890 it is the ordinary residence of the minor which is to be considered for the purpose of jurisdiction in a custody petition or Act VIII case. According to Mr. Mukherjee the child was residing at Kolkata; it is undisputed that she attended the school at 'La Martiniere School' till the end of December, 2018 but after termination of the petitioner's stay at her matrimonial home she took the child with her at Mallarpur and therefore, Mallarpur should be considered to be the place where the minor ordinarily resides.

Learned counsel for the father/opposite party submitted that the petition for transfer under Section 24 should be rejected as no ground has been made out for transfer. According to him it is the welfare of the child should always be given preference to consider a case for custody of a child and since the child was admitted in 'La Martiniere School' the mother had no right to take her away

without the consent of the father. More so, when it is on record that the child was promoted to the next class in the school and further that no transfer certificate has yet been issued by the school authority of 'La Martiniere School'. According to him the petitioner has acted illegally in getting the child at Mallarpur if it is true and if the document relied on by the petitioner worth believable. He further submitted that his client is agreeable to bear all cost relating to the study of child at 'La Martiniere School'. He submitted that his client is an alumnus of the said school and it will be better for the child to grow in that school where he had occasion to grow up. He submitted on instruction from his client that even for the better prospect of the child she should continue the study in 'La Martiniere School'. The father/opposite party is agreeable even to bear all incidental cost for separate accommodation charges for the girl child and her mother. Learned counsel relied on the following two decisions

- **Pravik Guha Thakurta - Vs. - Smt. Sharmistha Guha Thakurta (C.O. No. 3841 of 2018)** (unreported) decided on **19<sup>th</sup> March, 2019**  
and
- **Tejaswini Gaud -Vs. - Shekhar Jagdish Prasad Tewari** (decided on **6<sup>th</sup> May, 2019**)

The decisions cited by the learned counsel are distinguishable on fact and are not applicable in the facts situation of the present case.

It is important to note that who is the natural guardian of a Hindu minor according to Hindu Minority and Guardianship Act, 1956. Section 6 of the said Act says that “natural guardian of a Hindu minor, in respect of the minor’s person as well as his property – in the case of a boy or un-married girl is 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”. The child in this case is admittedly above five years. Therefore, the natural guardian of this Hindu minor girl should ordinarily be the father and it should be presumed that the child should be residing with the father. Father’s permanent residence is at Kolkata the daughter was also residing at Kolkata. She was taken to Mallarpur without the consent of the father and contrary to Court’s order. Even without taking any transfer certificate the child was put in a different school and allegedly got admitted there. In my view, the child was taken to Mallarpur to confer jurisdiction upon the District Court at Birbhum without considering that the child was very much in Kolkata before the Act VIII case was filed and this is believable because nothing was communicated to the school authority by the petitioner that the child was admitted in a different school. The presumption goes in favour of child’s ordinary residence at Kolkata may be for a temporary stay outside with the mother and that does not create a jurisdiction for the application for custody of the child.

The decisions cited by either of the parties are not relevant in the fact situation of the present case and they are distinguishable on facts. Therefore, I do not rely on those decisions cited by the parties.

In considering that Alipore Court having jurisdiction where the Act VIII case has been filed by the natural guardian/father, I hold as follows:

- 1) It is undisputed rather admitted by the mother of the child that the minor continued the session in 'La Martiniere School' till Christmas vacation and that there was an injunction from taking transfer certificate passed by the Civil Court. No plausible reasons has been furnished as to how without transfer certificate the child got admitted in a school at Mallarpur and that too without the consent of the natural guardian. The admission taken in the school at Mallarpur is, therefore, by suppressing the order of injunction and by some other method which cannot be recognized to be legal and valid and the child is compelled to stay with the mother against the wish of the natural guardian under the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956.
- 2) It is rather admitted by the mother/petitioner that even after alleged termination of her stay in the matrimonial home the child used to stay with her grand-mother and continued schooling at 'La Martiniere School' and this fact is supported by the statement of the opposite party that the child was promoted to higher class in respect of which he has furnished documents which are on record. Ignoring such development it is impermissible for this Court to hold that Alipore Court lacks jurisdiction over the custody of the child.

- 3) This Court holds that when undoubtedly father is the natural guardian of the minor daughter who has crossed five years, she was supposed to stay with the natural guardian in ordinary parlance and father being a permanent resident of Kolkata there was no wrong in instituting the Act VIII proceeding in the Court at Alipore jurisdiction.
- 4) I hold that the child was shifted from Alipore jurisdiction to Mallarpur by the mother firstly, to defeat the jurisdiction of the Court and such action is still in conflict with Court's order and should be condemned when this fact has brought to the notice of the Court. Court cannot ignore the same and direct transfer of the Act VIII case to any other place.

With these observations I hold that the learned District Judge before whom the Act VIII proceeding is pending shall continue with the same as it has got the jurisdiction to decide the case. The learned District Judge shall dispose of the proceeding at an early date preferably within three months without giving unnecessary adjournment to either of the parties. The learned District Judge shall be free to consider the application for custody and shall pass all necessary order for the benefit and welfare of the minor. Learned counsel for the opposite party/father in course of his submission requested the Court to record an undertaking on behalf of his client that he is agreeable to provide accommodation for both the child and her mother in Kolkata at his cost apart from the expenditure to be involved for the minor's study in 'La Martiniere school'. I am not inclined to record such submission at this stage as this will tantamount to

transgression over the jurisdiction of the learned Court below. The learned Court below shall however, be absolutely free to pass all necessary orders for the welfare of minor Sambhuti without being swayed by any observation made herein.

Therefore, I am not inclined to exercise my jurisdiction under Section 24 of the Code of Civil Procedure for withdrawing the Act VIII case from the Court at Alipore.

The learned Court below shall, however, give the petitioner full opportunity to contest the proceeding.

Application under Section 24 of the Code of Civil Procedure stands disposed of without any costs.

**In Re: C.O. No. 1094 of 2019**

This is an application under Section 24 filed by the wife/petitioner seeking transfer of Matrimonial Suit No. 246 of 2019 currently pending before the learned 9<sup>th</sup> Additional District Judge at Alipore. This application has been filed before this court on 18<sup>th</sup> March, 2019. In the application the petitioner has made out some grounds for transfer namely:

1. That she has a five year old female child and is not in a position to attend the Court at Alipore, South 24 Parganas inasmuch as she stays at her parental home in the district of Birbhum.
2. In attending the Matrimonial Suit in the Court at Alipore she has to travel 225 kilometres which might take five hours from Mallarpur, Birbhum to Alipore Court.
3. Mallarpur P.S. Case No. 29 of 2019 dated 30.01.2019 is pending at Rampurhat Court, District Birbhum where the opposite party and his family members have to attend.

The petitioner submitted that for her inconvenience as aforesaid she is unable to attend the Court in Alipore and for a proceeding which is pending in the court at District Birbhum is also to be attended by the husband. Therefore, on that consideration the Matrimonial Suit also should be transferred in the Court at Birbhum.

In my view, simply because the wife feels inconvenient to attend Court at Alipore is no ground for withdrawal of Matrimonial Suit from the Court at Alipore and to transfer it in the district of Birbhum. From the averments it does not appear that there was no cause of action for filing the Matrimonial Suit in the Court at Alipore. Therefore, the ground of inconvenience pleaded by the petitioner/wife has to be weighed with other attending circumstances. I have already held that Act VIII case cannot be transferred to Birbhum. Therefore, the

wife has to contest the proceeding in the Court at Alipore. The other grounds taken by the wife that a police case is pending in Rampurhat cannot be the sole ground for transfer of the Matrimonial Suit in the Court at Birbhum. The husband/opposite party is one of the accused persons in the said case. However, from the summons it appears that such P.S. case initiated after the Matrimonial Suit has been filed before the Alipore Court. That apart the petitioner has also not disclosed before which Court the P.S. case has been registered and pending and under which sections of the Indian Penal Code such complaint has been filed. That being so such statement in the Section 24 application need not be taken account of.

On consideration of the submissions of the learned Advocates and on consideration of the materials disclosed in the petition, I am of the view that the application under Section 24 deserves no order for transfer.

C.O. No. 1094 of 2019 is dismissed.

Urgent Photostat certified copy of this judgment, if applied for, be delivered to the learned advocates for the respective parties upon compliance of all usual formalities.

**(Sahidullah Munshi, J.)**