

V. Munisamappa Vs. Krishnamma

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Court : Karnataka

Decided On : Dec-02-1958

Reported in : AIR1959Kant150; AIR1959Mys150

Judge : A.R. Somnath Iyer, J.

Acts : [Guardians and Wards Act, 1890](#) - Sections 25, 47 and 48; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 151

Appeal No. : Civil Revn. Petn. No. 1206 of 1957

Appellant : V. Munisamappa

Respondent : Krishnamma

Advocate for Def. : N. Bheemacharya, Adv.

Advocate for Pet/Ap. : B. Ramachandra Rao, Adv.

Judgement :

ORDER

1. The petitioner in this revision petition is the husband and the respondent is his wife. It appears that the petitioner took a second wife some years ago. By his marriage with the first wife who is the respondent, he had a child who is still a minor aged about ten years. In the Court below the petitioner made an application under the provisions of Section 25 of the Guardians and Wards Act for the

restoration of the custody of his minor daughter to him. By an order made on December 17, 1956, that application was dismissed. But in the course of the order dismissing that application, the learned District Judge gave the following direction:

'The petitioner may take steps to get the minor girl Rhigarathnam admitted into the St. Teresa's School and the Hostel bearing all the expenses therefor. The minor girl shall stay with her mother during holidays. The petitioner may see her either in the respondent's house or in the hostel at all convenient times. He shall however not take her to his own house and keep her there for more than a day in a month without the content of the respondent in writing.' The view that the learned District Judge took was that by reason of the petitioner having taken a second wife, it was not in the interests of the welfare of the minor girl that the petitioner should have the custody of his minor daughter. That view which he took was in consonance with the well established principle that although the father is the natural guardian of a minor, he can never be an adequate substitute for the mother whose care and affection a minor child, and particularly one still of tender years, is so much in need of.

2. So that as it may, he gave the direction in regard to the education of the minor as mentioned above. That was the order which he made on December 17, 1956. The mother of the minor girl thereafter made an application on June 7, 1957, purporting to do so under the provisions of Section 151 of the Code of Civil Procedure for a modification of the directions given in the previous order referred to above. The learned District Judge, after perusing that application, directed the minor girl to be produced before him.

When she was so produced, he ascertained from her that she was not willing to go to the hostel and get admitted in the institution referred to in the earlier order. The learned District Judge thereupon ordered that since the minor girl appeared to him to be a girl of tender years and also sickly and particularly since he believed the statement made by the mother that the girl was vomiting blood, it was not possible for him to force the girl to go and reside in a hostel or to permit the father to put her into that hostel or that school by force.

The learned District Judge accordingly modified the order that he had previously made, the effect of which was that the direction that the minor girl should be educated in the St. Teresa's School was rescinded. He however gave a direction that the mother should get the minor girl educated properly. The father of the girl has presented this revision petition against that order made by the learned District Judge.

3. The first contention urged by Mr. Ramachandra Rao, learned Advocate for the petitioner is that the learned District Judge had no jurisdiction to rescind the order which he had made on December 17, 1956. This contention rests on the provisions of Section 48 of the Guardians and Wards Act which provides that an order made under the provisions of the Guardians and Wards Act becomes final unless set aside in appeal under Section 47 of the Act or in revision by the High Court.

Mr. Ramachandra Rao therefore urges that the order made on December 17, 1956 not having been set aside in appeal and not having been set aside in revision by this Court, had become final and that therefore the District Judge had no jurisdiction to revise his previous order for doing which the Guardians and Wards Act conferred no power on him.

4. It seems to me that this contention cannot be accepted as sound. It must be remembered that the orders made under the Guardians and Wards Act are always of a temporary character and that it is always open to the Court acting in the interests of the welfare of the minor to vary, alter or rescind, the orders which might have been previously made under the provisions of the Act.

5. It is true that the Guardians and Wards Act itself contains no provision for a review of the order made under the Act. But as pointed out by Davar J. In *Nagardas v. Annndrao*, ILR 31 Bom 590, the correct view is that on the analogy of English practice the Court which makes an order under the provisions of the Guardians and Wards Act in the interests of the welfare of the minor, has always the power to rescind, recall, vary or set aside an order made under the Act, if it is satisfied that the order is one that should not have been made. That was also the view taken by the High Court of Calcutta in *Rashmoni Dasi v. Gunada Sundari*

Dasi. 19 Cal WN 84: (AIR 1915 Cal 49).

6. That view in my opinion, also receives considerable support from the judgment of the High Court of Bombay in *Saraswathibai Shripad v. Shripad Vasanji*, AIR 1941 Bom 103. On p, 104 of the Report, this is what Beaumont C. J. said:

'Orders as to the custody of a child are al-ways of a temporary nature. Those interested in the minor are at liberty to apply to the Court. In this case the father can apply to the Court at any time; and if he, thinks that the health of his child is suffering, he can ask the Court to appoint a Doctor to examine the child. I do not think that on the evidence before us there is at the moment any necessity to appoint a Doctor to examine the state of the mother's health, but if at any time there is any reason for supposing time her ailment has returned, the father can apply to the Court to get her examined by an independent Doctor, and submission to such an examination would be made a condition to her retention of tie custody of the child.'

These observations apply with much force to the present case. On December 17, 1956, the Court was of the view that it was in the interests of the welfare of the minor that she should be admitted into the St. Teresa's Hostel and School. That order made on that date was on an application made by the husband which was itself dismissed. It was only incidentally that the learned Judge gave a direction that the girl should be admitted into the St. Teresa's school. Even the language of that order is not very clear that it was an order which the husband could have enforced.

It appears to my mind that it was more recommendatory in nature than one which the husband could have enforced. Even otherwise, if, after that order was made by the learned fudge, the mother was in a position to convince the learned District Judge that that order should not have been made or that that order is not in the interests of the welfare of the minor, I see no conceivable principle on which it could be said that the District, Judge had put it out of his power by merely making the previous order to reconsider it and make a proper order which would be in the interests of the welfare of the minor.

7. In this case, what transpired after the application made by the mother was that the minor girl was found to be vomiting blood. There is a suggestion in the proceedings that she was suspected to be suffering from tuberculosis. If that was the position, it is clear that the girl never required the care and attention of the mother at any time more than when the application was made.

To make the minor Rid who was unwilling, to enter the institution when her physical condition was of that description, and thereby force her to stay away from her mother would have been, as the learned District Judge has rightly observed, utterly against the interests of the welfare of the minor. In my opinion, the learned District Judge was competent to make the order which he made and I do not find it possible to agree with the contention urged by Mr. Ramachandra Rao that he had no jurisdiction to rescind the order which he had made on December 17, 1956.

8. Mr. Ramachandra Rao next contend; that if the order of the District Judge is upheld, it will lead to the result that the girl will grow up to be an uneducated woman. Mr. Bheemacharya on behalf of the mother has urged that the solicitude evinced by the father for the education of his minor daughter cannot be regarded to be sincere or real. It is not disputed that there is a decree for maintenance against the petitioner in a suit brought by his wife and the minor child.

It appears that in those proceedings a sum of Rs. 100/- was awarded to the wife and the daughter by way of maintenance and that that decree is now the subject-matter of a second appeal preferred by the petitioner. Mr. Bheemacharya states that the petitioner has paid nothing towards that decree and that as much as a sum of Rs. 10,000/- is due under that decree, no part of which has been paid by the petitioner. These allegations are not controverted by Mr. Ramachandra Rao.

Mr. Bheemacharya suggests that the intention of the petitioner is not so much as to get his daughter educated properly as he professes to be anxious to do, but that his intention is to separate the child from the mother in order that he may take advantage of that circumstance to obtain the custody of the child in some clandestine manner. Mr. Bheemacharya has also stated that if the petitioner immediately deposits all the arrears of maintenance due to the mother and the child under the decree referred to above, the respondent would be able to make

satisfactory arrangements for the education of the daughter.

9. There can be no doubt that there is considerable force in what Mr. Bheemacharya has stated. Even otherwise, Mr. Bheemacharya states that the respondent will make all necessary arrangements for the education of her daughter even though the petitioner does not pay the amounts due to the respondent and her daughter under the decree referred to above. Mr. Bheemacharya has also stated that far more important than the education of the girl is the attention that has to be paid to her health. He says that the respondent is in a better position to look after the health of the minor than the petitioner or the second wife whom he has married who can never be trusted to look after the minor as well as the respondent can or will. In these circumstances, this revision petition which should fail, is dismissed with costs.

10. Revision dismissed.