Mt. Ulfat Bibi Vs. Bafati

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SooperKanoon Citation : sooperkanoon.com/461471

Court : Allahabad

Decided On : Mar-28-1927

Reported in : AIR1927All581

Appellant : Mt. Ulfat Bibi

Respondent : Bafati

Judgement :

1. This case is a little difficult to deal with because everybody seems to have done everything he possibly could do in the matter except the right thing, but it is obvious that in this appeal we ought to try and do the right thing. There is no question of law involved so far as we can understand it, and still less is there any question of fact. A further difficulty arises as to a considerable doubt in our mind as to whether the appellant has any locus standi at all. But we are prepared to brush aside all fine points and try and put the matter straight. The position is that the minor has both parents living. They are Muhammadans, and by the Muhammadan Law the father is the natural lawful guardian until by some order of a competent Court he is deprived of his rights as such, and is automatically entitled to exercise the right of a guardian without any order of a Court appointing him, and it is correct to say, although it is irrelevant in this case, that an order appointing a person who is already by law a guardian, is an order without jurisdiction. But it is one of those orders without jurisdiction which if it does no good certainly does no harm, and, therefore, is not in itself a reason for interference by a Court of appeal. Side by side with the right of the father as the lawful guardian, exists the recognized right

of the mother by Muhammadan Law to have the custody of the child up to the age of seven. This question has already been considered and decided by the District Judge of the lower Court, namely, by an order of the 26th of September 1924. In that decision the District Judge said that the only matter was one of age and he found that the boy was still six years of age and that, therefore, the mother was entitled to the custody. He went further and he fixed the date when that custody ceased by law. He found that the child would be six years old at the end of the then calendar year and that, therefore, the father had to wait till the end of the next calendar year until he was seven. That would be the 31st December 1925.

2. We are of opinion that the learned Judge could have treated this application as an application to enforce the order of his predecessor, namely, that the custody of the child passed to the father on the 31st December 1925. Unfortunately in ignorance apparently of the fundamental law, an ignorance which may be pardoned because we think it is very common, the pleader for the father, undoubtedly intending to act on the previous order of Mr. Harper, applied under S 10 of the Guardians and Wards Act for the appointment of the guardian. It is obvious that be knew nothing about the dictum of the Privy Council, or of the case which has been cited to us from Oudh which we propose to follow, and that he really meant that the order of Mr. Harper should be complied with, namely, that the custody of the child should be handed over to the father. In his very natural ignorance on the subject it would be quite the usual thing to apply for the appointment of a guardian as a preliminary step to the next step of obtaining an order for the custody. No objection was raised by anybody according to the Judge's order. That was a serious error, according to Mr. Das, on the part of his client. She ought, being a person interested in the proper exercise of the jurisdiction of the Court below, to have appeared and pointed out to the learned Judge that he had no jurisdiction to make this order. But unfortunately nobody was present to point this out.

3. The learned Judge fell into the mistake that the pleader had originated. That is also not unnatural. These applications are dealt with, as everybody knows, summarily, and, one may say, somewhat expeditiously on Saturday morning, when something like a hundred of one sort or another are rushed through with

very little time to devote to them, certainly, not the time which we have already devoted to this appeal. But the learned Judge obviously intended to follow his predecessor's order. He says so, and he falls into a technical trap of passing an order which, strictly speaking, he had no jurisdiction to pass, namely, to appoint the applicant guardian, because the boy was then over seven years of age. What he ought to have done was to have said that the mother was no longer entitled to the custody and that the father was, and if necessary, have called the mother before him and ordered her personally to hand over the boy. That is really the only way in which these orders can be carried out because if the person who has the custody of the child disobeys that order, he or she can be punished for disobedience of order. We do not see any difficulty in the framing of the Act in making such an order, for example, the father might have applied, as he did apply, to the learned Judge under Section 10 to be appointed guardian, and the Judge might have said:

I cannot do that because I have no jurisdiction to appoint you guardian as you are already guardian, but I will make an order under Section 12 which the Act enables me to do for the temporary custody of the person of the minor, and I will hand him over to you and then if anybody wants to deprive you of the custody of the boy in future time, he will have to appear before me and show good cause.

4. But equally he might have done what we propose to do, namely, follow the decision of Mr. Justice Lindsay in the case of Mushaf Husain v. Mohammad Jawad [1918] 21 O.C. 194. Following the decision of the Privy Council in the Madras case reported as Mrs, Annie Besant v. Narayaniah A.I.R. 1914 P.C. 41 he held that there was no power to appoint the father guardian, but he also held that the expression 'guardian' used in Section 25 was not confined to statutory guardians but included the lawful guardian, such as the father, and that the custody referred to in Section 25 included both constructive as well as actual custody. That is a very ingenious mode of getting out of the difficulty, because there is a real difficulty in the wording of Section 25 which only comes into operation if the ward leaves or is removed from the custody of a guardian, and it is obvious that if a ward remains in the custody of his mother, however unlawfully, he does not leave the custody of his father, and, therefore, in a case like this the section does not work at all.

5. The judicial interpretation has taken a merciful view of the matter so as to prevent the Courts being rendered powerless and has treated the custody mentioned in Section 25 as constructive custody. The result is that this boy is the ward of his lawful guardian. The order ought not to have appointed the father guardian; but inasmuch as the father is the lawful guardian and entitled to the custody of the boy, he has in accordance with the judicial view, the constructive custody of the boy, although the boy in fact remains in the physical possession of the wife. Once the section is brought into play in that way there is no difficulty in the Court making an order which we propose to make under Section 25, directing that the boy be placed, or taken into the custody of the father, and the appellant must understand that if she does not within 15 days from to-day hand over the custody of the child to the father, notice will be issued against her for contempt of Court and she will be summoned before us and dealt with according to law for disobedience of that order.

6. That leaves one question undisposed of. Mr. Das rightly pointed out that if Section 25 is brought into play the Court is then bound to consider the welfare of the child. As this matter was dealt with ex parte in the Court below, and the Court was not conscious of its failure to appreciate the proper machinery its attention was not drawn to Section 2.5. We have no doubt whatever that it is in the interests of the minor prima facie and upon the facts as they are known to us, that the father should have the custody. We know nothing against him; nothing has been alleged against him. There is nothing in law to prevent a proper application being made 6n proper grounds to deprive him of the custody of his young son, and, at any rate, it would have to be made out by somebody who was able to show that he was a more suitable person than the father, We are of opinion that a woman who has been divorced, if this appellant has been divorced and has married a second husband, is not a person either herself better suited than the father, however unsuitable the father may be, and not a person who ought to be heard to say that the father is unsuitable. She has abandoned her home and husband either by her own free will, or as the result of her conduct and in the eyes of the law she has lost the right to assert a claim against the father for the child and probably the right to assert this appeal.

7. We have, however, thought it necessary to deal with the matter as it is before us in order to assist the Court below in the event of any further circumstances arising which require the matter to be dealt with again, and to correct the point which Mr, Das was right in drawing our attention to as on the face of it the order was one which the Court has no jurisdiction to make. The appeal must be dismissed.