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Court : Delhi

Decided On : Feb-20-1974

Reported in : 1975RLR29

Judge : Avadh Behari, J.

Acts : Guardian & Wards Act - Sections 12; Code of Civil Procedure (CPC), 1908 - Sections 144

Appeal No. : Criminal Revision Appeal No. 301 of 1974

Appellant : Om Parkash

Respondent : Pushpa

Advocate for Pet/Ap. : N.D. Bali and; Harihar Prasad, Advs

Judgement :

Avadh Behari, J.

(1) On 30th October, 1969 one Om Parkash made an application to the guardian judge for the custody of his minor son Vijay Kumar under S. 25 of the Guradian and Wards Act. Vijay Kumar was living with his mother Smt. Pushpa. Om Prakash and Smt. Pushpa were married several years ago and this male child was born to them on 2nd of April, 1964 It appears that later on their relations were unhappy and they drifted apart. Om Prakash made this application for the custody of his

minor son.

(2) In the proceedings under S. 25 the mother could not be served with summons in the ordinary manner. The Court ordered substituted service under 0. 5 r. 20, C. P. C. There was publication in the newspaper. Even then the mother did not appear to contest the proceedings. On 4th of April, I960, the guardian judge passed an ex parte order directing that the custody of Vijay Kumar be handed over to his father Om Prakash.

(3) On 16th September, 1970, Om Prakash made an application under S. 100 of the Code of Criminal Procedure. He wanted that the child be handed over to him and a warrant be issued for this purpose. The warrant was issued. On 28th September, 1970, the warrant was executed and the child Vijay Kumar was found with his mother. He was handed over to Om Prakash in execution of this warrant.

(4) The mother came to know about the guardianship proceedings pending in the Court at Delhi. On l6th October, 1970, she made an application under 0. 9. r. 13, C. P. C. for setting aside the ex parte order dated 4th April, 1970. This application was allowed by the learned Additional District judge on 2nd April, 1973, and in consequence the ex parte order was set aside.

(5) On 7th May, 1973, the mother made an application under S. 12, Guardian and Wards Act. She claimed the custody of the child under S. 144, C. P. C. She said that since the order dated 4th April, 1970 has been set aside she should be placed in the same position in which she was before the warrant was executed on 28th September, 1970. In a word she claimed restitution. This application was heard by the guardian judge. The main ground for the custody of the child which was put forward before him was that under S. 144, C. P. C. the parties must be put in the same position in which they were before the warrant was executed. The counsel for the mother argued that the provisions of S. 144 are mandatory and that on this ground the mother was entitled to the custody of the child. This argument appears to have prevailed with the guardian judge. He held that S. 144, C. P. C. was mandatory. He did not consider the question of welfare of the minor but merely said that this question will be considered after the child had been restored to the mother On 4th May, 1974, he allowed the application and directed Om Prakash to

make over the custody of the minor to the mother and he has come up in revision.

(6) The counsel for the respondent Smt. Pushpa mainly relies on the provisions of S. 144, C. P. C. and contends as was done before the Court below that the provisions of S. 144, are mandatory. He relies on State Govt. v. M. Jeevraj & Co. Air 7973 A. P. 26, S. B. Singh v. M. M. Singh, : AIR1972 Delhi212 and Shiv Saran v. Satbhrawan Trust 1961 Plr 615 in support of his contention that the principles of restitution are equally applicable to a guardianship case.

(7) The main question is : whether the doctrine of restitution as embodied in S 144, C. P. C. applies to a guardianship case or not In proceedings for restitution the Court should pass an order consistent with justice to both the parties. Restitution considered in the light of doing justice between the parties will necessarily have to depend on the facts and circumstance of each case and cannot be reduced to the form of an inflexible rule that Court should have regard only to the detriment suffered by one party and not to the position of the ether.

(8) The doctrine of restitution is that on the reversal of a judgment the law raises an obligation on the party to the record, who received the benefit of the erroneous judgment, to make restitution to the other party for what he had lost and it is the duty of the Court to enforce that obligation unless it is shown that restitution would be clearly contrary to the interests of justice : See Bhagwant Singh v. Sri Kishen Das, : [1953]4SCR559 Restitution is essentially a doctrine of equity and cannot be applied in a case where it conflicts with reason and justice.

(9) In my opinion the doctrine of restitution as laid down in S. 144 does not apply to the custody proceedings. The reason is that in these proceedings there is no benefit which the other side has gained which has to be restored to the opposite party In proceedings for custody there is no question of money or property. The only question is about the custody of the child. In cases concerning the custody of the child the paramount consideration is the welfare of the minor. The pivotal factor is the benefit and well-being of the minor. Everything is subordinate to that overriding consideration. S. 144, if at all it is applicable, must also give way to that primary consideration. The child cannot be treated as a pawn in the game of litigation and he cannot be handed over to one party at one stage of litigation and

to another at another stage. The child is not a chattel. He is a human being. He has been living with the father for the last four years and this has created association and given rise to expectations on the part of the infant which it would be undesirable in his interests to disturb or disappoint. At this impressionable age it will not be conducive to the welfare of the child if he is removed from father's custody to whom he feels attached.

(10) The argument of the counsel for the respondent amounts to this that the execution of the warrant under S. 100, Cr. P. C. is, as it were, an execution of a decree or order under Code of Civil Procedure. It is argued that since the order has been set aside the mother is entitled to restitution. I do not agree firstly for the reason that the foremost consideration in guardianship cases is the welfare of the child and secondly it is not a case of an execution of a decree to which the provisions of S. 144, C.P. C. apply.

(11) In my opinion the guardian judge approached the question from a Wrong angle. The welfare of the child has to be considered by the judge at every stage, I would say, at all stages. It was not a right approach to say that the provisions of S. 144 being mandatory the custody of the child must first be given to the mother and whether would be in the interest of the minor or not would be considered at a later stage. This approach subordinates the interests of the minor and his welfare to the doctrine of restitution. This is the main flaw in the reasoning of the Court below.

(12) I have heard the counsel for the parties on the question whether it will be in the interest of the minor to hand over the custody to the mother at this stage. I thought this to be right because if I order an enquiry to be made on this question by the guardian judge at this stage there will be a duplication of proceedings for this is the main question to be decided by him finally but after giving opportunity to the parties to produce evidence.

(13) As I have said the minor Vijay Kumar was born on 2nd April, 1964. Today he is 101 years old. On 30th October, 1969, when the application was made he was 51'1 years. From 28th September, 1970 till today he is in the custody of the father. 4 years have passed by. I called the minor in Court and enquired from him if he was willing to live with the mother. He flatly refused to do so. It appeared to me

that he has attained the age of discretion. He appears to be attached to his father. He refused to go to the mother. Will it be in the interests of the child if I order as was done by the trial Court that the custody be restored to the mother I think it will be plainly wrong.

(14) The provisions of the Guardian and Wards Act, and the Hindu Minority and Guardianship Act clearly point in one direction and it is this. Of a male child of 10' years the father is the natural guardian. He does not require an appointment by any Court. His personal law gives him that right. He is entitled to the custody of the child and he can enforce his right to that custody at any time, It is true that the rules regarding guardianship and custody of the minor are not rigid and inflexible. These are also subordinate to the paramount considerations of the welfare of the minor : See S. 6 of the Hindu Minority and Guardianship Act.

(15) Among Hindus, as in England, the father is the natural guardian of his children during their minority. But guardianship is in the nature of a sacred trust, as he cannot thereforee during bids life time substitute another to be guardian in his place. He may in the exercise of his discretion as guardian, entrust the custody and education of his children to another but the authority he thus confers is essentially a revocable authority and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such control and education once more into his hand: See Mrs. Annie Besant v. Narayaniah I. L. R. (1915) 38 Madras 807 (P. C.)

(16) When father is alive Court has no power to appoint or declare a guardian. Father does not require an order of the Court to exercise his rights. It has not been shown in this case that he is unfit to be guardian of the person of the minor : See S. 19(b) of the Guardian and Wards Act.

(17) It appears to me that it will not be in the interest of the welfare of the minor if his custody is handed over at this stage to the mother. The father is employed in the railway. He is earning Rs. 250.00 per month. The mother, her counsel says, is eking out a living by stiching clothes. I do not think that the mother will be able to support or give good education to the child if he is committed to her care and custody. The counsel for the mother submitted that she is entitled to the custody of

the minor as she will be able to look after him. It was said that there is no female member in the family of the husband who can look after the child. This consideration alone I think should not weigh with me and I do not propose to hand over the child to the mother on this insubstantial ground especially when the child is 10 years old. 1 have to take the wishes ef the minor child into consideration and more so when he is able to express an intelligent preference, Petition allowed

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