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Court : Kerala

Decided On : Sep-08-1958

Reported in : AIR1961Ker154

Judge : P.T. Raman Nayar, J.

Acts : Hindu Minority and Guardianship Act, 1956 - Sections 5 and 6; ;Travancore Nayar Act, 1100 - Sections 10(2); Guardians and Wards Act - Sections 7(1) and 25; Constitution of India - Articles 246(2) and 254

Appeal No. : Civil Revn. Petn. No. 491 of 1958

Appellant : Kamalakshi Amma Saraswati Amma

Respondent : K. Bhaskara Menon

Advocate for Def. : K.S. Sebastian, Adv.

Advocate for Pet/Ap. : P. Govindan Nair and; K. Sukumaran, Advs.

Disposition : Petition dismissed

Judgement :

ORDER

P.T. Raman Nayar, J.

1. I think that the Court below was quite right in holding that the question whether the father or the mother was the lawful guardian of the person of the minor children in question fell to be determined under Section 6 of the Hindu Minority and Guardianship Act (Central Act 32 of 1956) and not under Section 10 (2) of the Travancore Nayar Act (Tra-vancore Act of 1100) and that consequently the father's application for an order (under Section 7(l)(b) of the Guardians and Wards Act--Central Act VIII of 1890) declaring him to be the personal guardian find (under Section 25 of the same Act) giving him custody of the children from the hands of the mother had to be decided on the merits and could not be summarily dismissed (as prayed for by the mother, who is the petitioner before me) merely because, subsequent to the initiation of the proceedings, the parents had become divorced.

2 The parents and the children are Nayar Hindus governed by the provisions of both Travancore Act II of 1100 and Central Act 32 of 1956. Under Section 10 (2) of the former Act, where the parents are divorced the mother shall be the guardian of both the person and property of the minor children. If this were the law applicable, the fathers application would not be maintainable if it were to be viewed merely as an application under Section 25 of the Guardians and Wards Act as both parties seem to have viewed it. (Actually, however, the application is primarily one under Section 7 and the relief claimed under Section 25 is only a consequential relief; and once a competent Court appoints or declares the father to be the guardian, the mother's guardianship under Section 10 (2) of Travancore Act II of 1100 would automatically ceaso so that there would

be no impediment for an order of custody under Section 25 of the Guardians and Wards Act in favour of the father if the Court considered that to be for the welfare of the children).

But under Section 6(a) of Central Act 32 of 1956 the father is the guardian. No exception or other special provision is made for the ease of wards whose parents are divorced. Section 6(a) of the Central Act is therefore applicable whether or not the father is divorced from the mother, and it therefore follows that Section 10(2) of Travancore Act II of 1100 is inconsistent with tin's provision.

In the absence of anything express Or implied restricting the application of Section 6(a) of Central Act 32 of 1956 to children the marriage of whose parents is still subsisting, I cannot agree that that section provides only for such a case and is therefore not inconsistent with Section 10 (2) of Travancore Act II of 1100 which provides for a case where the parents are divorced.

3. The question then is which of these two inconsistent provisions is to prevail. Undoubtedly it must be Section 6(a) of Central Act 32 of 1956 which is not merely the later law but which, by the reason of the overriding effect over previous inconsistent laws given by Section 5(b) of the said Act, has the effect of expressly repealing Section 10 (2) of Travancore Act of 1100.

4. It is argued with reference to article 254 of the Constitution that Travancore Act II of 1100 being an existing law with respect to a matter in the concurrent list within the meaning of that article, it cannot be amended or repealed by a Central Act, the proviso to the second clause of that Article being applicable only to the amendment or repeal of a post Constitution State Law and not of an 'existing law'.

But it is not article 254 that confers on Parliament or on a State Legislature the power of making laws and thus of amending or repealing previous laws on matters in the concurrent list. That is done by Article 245(1) read with Article 246(2). What Article 254 does is to place a restriction on that power in the hands of a State Legislature by providing that a Central Law or an 'existing law' shall prevail over a State' law on the same matter unless the procedure in Clause (2) thereof is followed.

The restriction applies only to the Legislature of a State and no restriction whatsoever is placed an the power of Parliament. The proviso to Clause (2) of the article only emphasises the overriding power of Parliament by laying down that, even where the procedure prescribed by that clause has been followed, the power of Parliament to amend or re' peal the State Law concerned remains unaffected.

If the argument advanced were correct it would mean that an 'existing law' on a concurrent subject could not be amended or repealed by Parliament but only by die State Legislatures in accordance with Article 254(2). And Central Acts like the Part B States Laws Act (Act 3 of 1951) which repealed many 'existing laws' on concurrent matters (like the laws corresponding to the Indian Penal Code and the Criminal Procedure Code) would be bad. I have little hesitation in rejecting the argument.

It seems to me clear that by virtue of Article 246(2) the power to repeal or amend 'existing laws' on matters in the Concurrent list resides both in Parliament and in the State Legislatures whether the law in question be one made by the Centre or a Province or an Indian State. The exercise of that power by a State Legislature is subject to the restrictions in Article 254; but that article places' no restriction on its exercise by Parliament.

5. It follows that even if the father's application is to be regarded as one solely under Section 25 of the Guardians and Wards Act (as it well might be if Section 19 of that Act is read as precluding & father from applying under Section 7) the subsequent divorce cannot affect it since he would still remain the lawful guardian of the wards under Section 6(a) of Central Act 32 of 1956.

His application cannot be summarily dismissed but will have to be decided having regard to the considerations in Section 25 of the Guardians and Wards Act, as also the provision in Section 6(a) of Central Act 32 of 1956 that the custody of a minor who has not completed the age of five--and of the two minors concened in this Case, only one has attained that age -- shall ordinarily 'be with the mother.

6 I dismiss the petition. No costs.

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