

Vasudevan Vs. R. Viswalakshmi

Vasudevan Vs. R. Viswalakshmi

SooperKanoon Citation : sooperkanoon.com/723812

Court : Kerala

Decided On : Dec-02-1958

Reported in : AIR1959Ker403

Judge : K.T. Koshi, C.J. and; C.A. Vaidialingam, J.

Acts : [Hindu Minority and Guardianship Act, 1956](#) - Sections 6

Appeal No. : Civil Misc. Appeal No. 84 of 1956

Appellant : Vasudevan

Respondent : R. Viswalakshmi

Advocate for Def. : C. Unnikanda Menon, Adv.

Advocate for Pet/Ap. : V. Balakrishna Eradi and; E.P. Kochukrishnan, Adv.

Disposition : Appeal allowed

Judgement :

1. This appeal arises out of an unfortunate dispute between a husband and wife regarding the custody of their minor daughter by name Prabala Devi.
2. It is clear from the evidence that the husband the appellant is charging the wife with disobedience due to the encouragement given to her by her father and the respondent-wife, in turn, is alleging her inability to live with the husband, because

of the ill treatment of the husband's mother. The parties have not separated and still continue to be husband and wife. Therefore, we will dispose of this application strictly on the legal aspects arising out of the decision by the learned District Judge.

3. The application by the wife was filed under sections 7 and 25 of the Guardians and Wards Act -- Central Act VIII of 1890. The substance of the application is as follows:

The petitioner therein is the mother and the respondent therein is the father of the minor girl, Prabala Devi' aged about 2 1/2 years, born to them on 26-2-1955. The husband did not take the wife and child to his house after confinement, nor did he pay anything for their maintenance. Therefore, the wife filed M.C. 22/56 in the Magistrate's Court for maintenance on 28-3-1956; the matter was compromised and the husband agreed to take the wife and child and maintain them.

But after some time, again the husband sent the mother and child away from his house. This resulted in the wife again filing an application before the Magistrate for maintenance namely, M.C. 141/56. That also was compromised and the wife joined her husband along with the child. A few weeks thereafter, on '25-1-1957, the husband kept the child alone in his house with him and sent away the wife to her father's house and the wife is staying with her father ever since, and the minor daughter is kept by the husband in his house.

4. It is further stated that the child is only 2 1/2 years old and requires the constant attention of the mother, the petitioner therein. The husband is charged with detaining the child just to spite the wife with whom he is not on good terms. The welfare of the child requires that it should be in the custody of the mother and not the father.

5. These are the material allegations in the application which was filed on 31-10-1957. The prayers contained in the application are as follows:

'A, To appoint the petitioner as the guardian of the person of the minor girl Prabhala Devi;

B. To direct the respondent to surrender the child to the custody of the petitioner; and

C. To grant such other reliefs as this Hon'ble Court deems fit to grant.'

6. The husband contested the application on the ground that it is not maintainable in law. It was admitted that the petitioner was his wife but she has all along been a very disobedient wife. She is under the influence of her father and has forgotten her obligations to her husband and without any reason whatsoever, has left the husband's house and is residing with her father. There was no neglect by the husband to look after either the wife or the child. She is entirely influenced by the evil advice of her father and has been leaving the husband's protection under the said evil advice. As she had absolutely no justification for living separately, she had to agree to the husband's offer to take her back and therefore, the two applications before the Magistrate had to end in the manner they did. The wife has also filed a civil case against the husband and his mother alleging that some money in the shape of Stridhanam is due to her. It was further alleged in the statement that the child has been with the husband ever since the wife left the house on 25-1-1957; and she has never cared to enquire about the child and the application itself has been filed nearly 10 months after she left the husband's house.

The child is very happy and is looked after very well by the husband and his mother who have no other children to be looked after. The wife has no love for the child as will be seen from the fact that she simply left the child in the husband's house and went away on 25-1-1957 and has not taken any further interest in the child. The object of the application is only to claim maintenance for the child, because the wife is fully aware that she cannot get separate maintenance for herself.

7. It was also stated that the husband is the natural guardian of the minor child in law and there are absolutely no reasons for depriving him of his legal right. The circumstances mentioned in the counter-affidavit will also show that there are absolutely no reasons for giving the custody of the child to his wife. If the custody of the child is given to the wife, it will be deleterious to the health and safety of the

minor child

8. Along with the counter-affidavit of the husband, his mother Kochi had also filed a supporting affidavit to the effect that the minor child is living with its father and in being taken care of properly by herself and her son the respondent to the application. It was also stated that it is not to the interest of the minor child that it should be kept in the custody of the petitioner the wife.

9. It will be seen that there are absolutely no allegations in the affidavit filed in support of the application by the wife that the husband is unfit to be the natural guardian of the minor child. No allegations whatsoever have been made that the father has done anything prejudicial to the interest of the minor which with warrant his removal from the position given to him in law as a natural guardian of the minor child. Notwithstanding the fact that there were no allegations against the husband which would justify his being removed from his guardianship; the petition prayed, as mentioned earlier, for appointing the wife as the guardian of the person of the minor girl, which itself could be done only when the father, the husband, is removed from his position as a natural guardian.

10. The learned District Judge, by his order dated 15-3-1958, allowed the application and appointed the petitioner before him namely, the wife as the guardian of her minor daughter and directed the husband to hand over the child to the petitioner before him, within a week from that date.

11. Mr. Balakrishna Eradi, learned counsel for the appellant, has very strenuously attacked the judgment of the learned Judge on the ground that the order is wrong both in law and on the facts in this case. The learned counsel contended that by virtue of Section 6(a) of the [Hindu Minority and Guardianship Act, 1956](#), Central Act 32 of 1956, the father is the natural guardian of the minor's person and property in the case of a boy or an unmarried girl. But under the proviso to that sub-clause, the custody of a minor, who has not completed the age of 5 years, shall ordinarily be with the mother.

No allegations as to why the natural guardian, the father, should be removed from his guardianship and the mother appointed as the guardian, have been made in

the affidavit filed in support of the application. Nor is there a finding by the learned Judge that the husband is guilty of any such conduct as would give the court jurisdiction to remove him from his guardianship. In the absence of these circumstances, the learned counsel contended, that the lower court was wrong in appointing the wife as the guardian of the minor child and that order is without jurisdiction. The learned counsel further contended that the only point which should have been considered by the lower court was as to whether the custody of the minor child should continue to be with the father or whether the minor child should be put in the custody of the mother.

Even the proviso to Sub-clause (a) of Section 6 only says that the custody of a minor, who has not completed the age of 5 years, shall ordinarily be with the mother. Therefore, the court had to consider from the materials placed before it whether the circumstances of the case show any reason for the custody in this case not being with the mother.

12. Mr. C. Unikanda Menon, learned counsel appearing for the respondent wife, has supported the order of the learned Judge. The learned counsel contended that even if the order appointing his client, the wife, as the guardian of the child may not be correct in law, still the order can be construed as one giving the custody of the child to the mother as contemplated under the proviso to Sub-clause (a) of Section 6. The learned counsel also contended that the materials in this case justified the conclusions of the learned Judge that the child should be handed back to its mother, the wife of the appellant, before us. Even during the hearing of the appeal, we adjourned the matter to find out whether the parties will not be able to adjust their differences. But unfortunately, no settlement has been reported.

13. In our opinion, the order of the learned Judge cannot be sustained. He has not kept in view separately the circumstances under which a natural guardian, like the father, could be removed from his guardianship and the circumstances which the court has to consider in considering whether the custody of a minor child should be with the father or with the mother in the circumstances in this case.

14. Section 6 of Central Act 32/56 referred to earlier, runs as follows:

'Natural guardians of a Hindu Minor: The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property) are-

(a) in the case of a boy or an unmarried girl 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 other sub-clauses are not relevant for the purpose of this appeal. Therefore, the right of the father to be the natural guardian of a Hindu minor is well recognised in the said section. No doubt, the proviso states that the custody of a minor who has not completed the age of five years, shall ordinarily be with the mother. Neither in the petition, nor in the evidence, is there any allegation that the husband has done anything which would give in law a jurisdiction to the court to remove him from the position of a natural guardian conferred on him by Statute.

15. As laid down by their Lordships of the Privy Council in the decision reported in *AnnieBesant v. Narayaniah*, ILR 38 Mad 807: (AIR 1914 PC 41), no order declaring a guardian could be made during the father's life, unless in the opinion of the court, he was unfit to be their guardian. That is not clearly the case before us. To a similar effect are the decisions of the Madras High Court reported in *Satyanarayana v. Venkata Laxmi*, AIR 1924 Mad 45 and in *Atchayya v. Kosaraju Narhari*, AIR 1929 Mad 81. No doubt Mr. Unikkanda Menon attempted to distinguish these cases on the ground that those decisions were all given before the present enactment namely, Central Act 32/56 came to be enacted. We do not think, there is any substance in this contention. Section 6 is very clear and the natural guardian cannot be removed from his guardianship given to him by law unless the court is satisfied that he is unfit to continue to be the guardian.

16. The order of the learned Judge appointing the respondent as guardian of the minor girl, has to be set aside on this short ground.

17. But we will also consider the question whether the custody of the minor child should continue to be with the father, the appellant, or his wife the respondent. The learned judge has simply referred to Clause (a) of Section 6 and has

observed as follows:

'The respondent is not entitled to retain this child of 2 1/2 or 3 years old with him as per Section 6(a). The custody of the child must be with the mother till the minor girl attains five years. On this ground alone the petitioner is entitled to get custody of the minor girl.'

'This reasoning of the learned Judge is absolutely fallacious, because the proviso to Clause (a) of Section 6 is only to the effect that the custody of a minor, who has not completed the age of five years, shall ordinarily be with the mother; whereas the learned Judge assumes that Section 6(a) directs the custody of the child to be only with the mother till it attains the age of five years. That the Judge has taken that view is also clear from the succeeding sentence, 'on this ground alone the petitioner is entitled to get custody of the minor girl.'

18. Clause (a) of Section 6 does not confer any such absolute right to the custody of a minor child who has not completed the age of five years, to be always with the mother. The proviso is very guarded and it says, 'shall ordinarily be with the mother.' Therefore, the court has got a duty to see whether the custody of such a minor child should be with the mother. No doubt, the proviso proceeds on the basis that the mother should ordinarily have the custody of the minor child. The question in this case is whether the husband has established satisfactorily any reasons for holding that the custody of the minor should not be with the mother but with the father. Even according to the respondent, she has been sent away from her husband's house on 25-1-1937 without the child. According to the husband, the wife left the child in his house and went away on 25-1-1957. Whatever it is, one thing is very clear that the respondent has been living in her father's house, even on her own case, from 25-1-1957 without the child. The application giving rise to this appeal, has been filed by her only on 31-10-1957. That clearly shows that for nearly 10 months, at any rate, she has not worried herself to enforce her rights, if any, to have the custody of the child. The child, as stated earlier, was born on 26-2-55 and, at any rate, from 25-1-1957 the child has been living exclusively with her father the appellant before us.

19. During the course of the hearing of this appeal, we had directed the appellant to produce the child in court and it was so brought to the court. The impression that we found from the movement of the child with the appellant was that it was very affectionate towards him and that it is being looked after very well. The appellant has got his mother who is living with him and they do not have any other children in the house. The fact that the respondent has not worried herself about this child, at any rate, till 31-10-1957 gives us the impression that the application itself has been filed by her with ulterior motives. As observed at the beginning, we do not propose to comment more about this.

20. The child has been continuously with the appellant from 25-1-1957 and we are satisfied that the child is properly looked after by the appellant and we do not see any reason for changing the custody of this child to the mother especially, when we are satisfied that it is happy and affectionate with the father.

21. The further reason given by the learned Judge about the dealings that the appellant had regarding his property, has absolutely no bearing on a consideration of the question before us. This is also well established by the decision already referred to in AIR 1929 Mad 81.

22. In the result, the order of the learned District Judge is set aside and this appeal allowed.

Being a dispute between the husband and wife, we make no order as to costs,

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com