Mohideen Ibrahim Nachi Vs. L. Mahomed Ibrahim Sahib by Agent, L.M.E. Lebbai Thambi

Mohideen Ibrahim Nachi Vs. L. Mahomed Ibrahim Sahib by Agent, L.M.E. Lebbai Thambi

SooperKanoon Citation : sooperkanoon.com/785834

Court : Chennai

Decided On : Dec-07-1915

Reported in : (1916)ILR39Mad608

Judge : Sadasiva Ayyar and ;Napier, JJ.

Appellant : Mohideen Ibrahim Nachi

Respondent : L. Mahomed Ibrahim Sahib by Agent, L.M.E. Lebbai Thambi

Judgement :

Sadasiva Ayyar, J.

1. This appeal is against the order of the District Judge of Tinnevelly passed under Section 25 of the Guardians and Wards Act directing that the minor Shaik Abdul Khadir who is between 15 and 16 years old be returned to the custody of his father the petitioner. The appellant is the petitioner's mother-in-law (the mother of the deceased mother of the minor Shaik Abdul Khadir).

2. The contentions in appeal are: (1) 'that it has not been proved to be for the welfare of the minor to be returned to the custody of the father' (sixth ground of appeal); (2) 'the District Judge erred in holding that Section 25 of the Guardians and Wards Act applied to the case' (sixth ground of appeal); and (3) ' the parties being shaffis and the boy being 16 has a discretion in law to reside with his mother and in her absence with his grandmother ' (fifth ground of appeal).

3. As regards the first of these three contentions, the District Judge's conclusion that it is for the welfare of the minor that he should return to the father has not been shown to be erroneous. On the question as to welfare, the wishes of the minor who is over 14 should, no doubt, be consulted, not as conclusive on the matter but as an important factor to be taken into account in arriving at a conclusion. The minor was examined as the appellant's second witness and he says 'I know my grandmother well and I have not seen my father for several years. That is the only reason why I say I want to live with my grandmother.' The learned District Judge has considered this preference which in the words of the District Judge ' is not unnatural but which can hardly be deemed intelligent.' I would

4. As regards the second contention, Section 25, Clause 1 of the Guardians and Wards Act, is as follows :

If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the Welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

5. The appellant's learned vakil argued that, as the minor's maternal grandmother was the lawful guardian of his person under the Muhammadan law after the mother's death and till be attained the seventh year of his age and she was in custody of the minor's person till that age and that as she has only continued in the

custody of the person of the minor till now, the father never had the actual custody of the boy's person from when the father (respondent) became entitled to such custody and hence the minor did not live in the custody of the father at any time nor was he removed from the father's custody and therefore no order for his return to such custody can be made under Section 25.

6. In Annie Besant v. Narayaniah I.L.R. (1915) Mad. 807, their Lordships of the Privy Council say at page 820 that ' a suit inter partes is not the form of procedure prescribed by the Act for proceedings in a District Court touching the guardianship of infants.' This observation does not however definitely lay down that the Act is exhaustive as to the remedies of guardians. The preamble of the Act (Act VIII of 1890) is ' Whereas it is expedient to consolidate and amend the law relating to guardian and ward.' In Sham Lal v. Bindo I.L.R. (1904) All. 594, Blair and Banerjee, JJ., held that the Guardians and Wards Act was intended by the Legislature to be a complete code defining the rights and remedies of guardians and wards, that no separate suit would lie by a Hindu father for the custody of his child and that he must resort to the remedy given by Section 25 of the Act. In the very recent case--Utma Kuar v. Bhagwanta Kuar I.L.R. (1915) All. 515--Chamier and Piggott, JJ., follow Sham Lal v. BindoI.L.R. (1904) All. 594 and held that a guardian appointed under the Act was only entitled to apply under the Act for the custody of the ward and could not bring a separate suit. In Utma Kuar v. Bhagwanta Kuar I.L.R. (1915) All. 515 a very similar argument to that put forward in the case before us was urged before the learned Judges, namely, that as the mother was not in custody of the child when she was appointed guardian of the person, Section 2 which mentions 'Order for return to her custody ' cannot confer jurisdiction on the Court to pass an order for placing the minor for the first time in the custody of the guardian. The learned Judges overruled this contention on two grounds: (a) that the Court had power under Section 12 of the Act to place the minor in the temporary custody of the appointed guardian notwithstanding that the application of the guardian for her appointment as such had been granted already: and (b) that Section 25 can be availed of by the guardian even though she had not been in the actual custody of the minor at the time of her appointment as such as she might be deemed to have got custody ' technically' from when her appointment was made and that an order to place the boy in her custody can therefore be brought under the words ' Order for return to custody ' used in Section 25.

7. While I feel doubtful (with the greatest respect) as regards the applicability of Section 12, I have after anxious consideration arrived at the opinion that though some straining of the language of Section 25 has to be resorted to, the clear intention of the Legislature will be carried out by the interpretation placed by the Allahabad High Court on that section. I do not think it at all likely that the Legislature intended to omit to provide for the grant of a power to the District Court to entertain an application by a guardian for the 'custody of his ward for the first time even where the District Court had itself appointed him as such guardian, in a case where the ward had never before been in his custody, while the Act has bean anxious to enact that orders for temporary custody of the ward could be made even before the appointment of the guardian. Nor it is likely that a remedy by a separate suit in such cases was intended by the Legislature. In Jagannadha Rao v. Kamaraju I.L.R. (1901) Mad. 284, the words ' taking out of the keeping of the lawful guardian of such minor' found in Section 363 of the Indian Penal Code were held to include cases where the actual ' keeping, ' out of which the minor was taken had been in a person who was not the lawful guardian but in a third person who had obtained the custody of the minor with the guardian's knowledge and consent. In the present case, it seems to me clear from the evidence that the grandmother had the custody of the boy with the knowledge and consent of the father after the boy obtained the seventh year of his age and the father himself might be deemed to have been in ' custody' of the boy under such circumstances within the meaning of Section 25 and an order to the appellant to put the boy in the custody of the father can be passed under Section 25 as falling within the expression 'Order for the return' to the custody, found in that section, A ward who was never in the actual custody of his legal guardian but was in his legal custody (the actual custody being with the guardian's consent with another) might be deemed to be removed from the custody of the guardian when the person in actual possession repudiates to the guardian's knowledge the right of the guardian to the actual or legal custody of the minor. An order for return to the custody will be effectuated by putting the minor either in the guardian's actual custody or even by putting the minor in the actual custody of some other person delegated

by the father (like a school master or a friend) to obtain that custody from the wrong doer. To treat the word 'custody' as including both actual and constructive custody in all the three places where that word occurs in Section 25(1) does not seem to me to be too violent a stretch of the language of the section. I would therefore reject this second contention also.

8. As regards the third contention, Amir Ali, volume 2, page 290, says that ' the Shafis and the Hanbalis allow the boy at the age of 7 the choice of living with either of its parents. Should he prefer to continue with his mother, he is allowed to do so until ha attains the age of puberty, when he has no option and his guardianship devolves on the father. In practice, however, the father's right to the custody of the boy's person terminates with his puberty for, he is then personally emancipated from the patria poteatas ' In a book called 'Minhaj Et Talibiu' (a manual of Muhammadan Law according to the school of Shafi), it is said at pages 67 to 69 ' the incapacity of a minor ceases at puberty, only if his intelligence is sufficiently developed to allow of his being entrusted with the administration of his property. The minor who, having attained the age of puberty, has an intelligence insufficiently developed to be entrusted with the management of his property remains in a state of incapacity; otherwise his incapacity ceases ipso facto on his attaining majority.' The Shafi law also seems to fix the age of 15 as the age of majority unless signs of puberty have shown themselves earlier (but not earlier than 9). In Reade v. Krishna I.L.R. (1886) Mad. 391, it was held that though under Hindu Law the father is not entitled to the custody of the person of his son after the boy attained 16 years of age, the passing of the Indian Majority Act of 1875 (section 3) by continuing the minority of the boy till he completed the eighteenth year of his age, extended the right of the father to the custody of the boy's person till such age of 18. Notwithstanding the able arguments of Mr. S. Srinivasa Ayyangar that that decision is unsound so far as it deals with the right of a Hindu son to personal emancipation from the patria potestas after he attains his sixteenth year, I am not prepared to dissent from that decision especially as Section 2, Clause (c) of the Indian Majority Act impliedly affects the ' capacity ' in all ways of any person who had not attained the majority under the law applicable to him before 2nd March 1875, other than in respect of the matters excepted in the section. If, notwithstanding the personal emancipation under Hindu Law, a Hindu boy continues under the custody of his father till 18, a Mussalman boy also is bound to remain in the custody of his guardian till he attains 18 notwithstanding that under the Shafi Law to which he is subject, his personal emancipation would have taken place when he attained the age of 15 or when he attained puberty between the ages of 9 and 15. I would therefore reject this third contention also. It only remains to notice two minor arguments advanced for the appellant. One of them was based upon the practice of the English Courts in granting writs of Habeas Corpus. The principal cases relating to the English practice were considered in Reade v. Krishna I.L.R. (1886) Mad. 391 and it was pointed out in that case that the writ of Habeas Corpus is not the appropriate remedy for enforcing the natural right of the father over the person of a son when such son is over 14'.' and' that other appropriate legal remedies should be resorted to by the father for obtaining the custody of the person of such :a boy. The second minor argument was based on Section 21 of. the Guardians and Wards Act which impliedly assumes that a minor is (a) competent to act as guardian of his wife and child, (6) that he is competent to be the 'managing member of an undivided Hindu family' and (c) that he is as such manager, competent to be the guardian of the wife or child of another minor member of that family. This final clause has gob its own implication that while any other minor is competent to be the guardian of his wife or child, a minor who is a junior member of an undivided Hindu family is not competent to be the guardian even of his own wife or child. I am very doubtful whether a minor can at all be the managing member of a Hindu family, though he is the senior male member. 'Guardian 'in Section 21 is evidently intended to include the guardianship of both person and property. It does seem anomalous that a minor could be the guardian of the person of his wife and children, that is, entitled to the custody of their persons and the management of their properties while his own person is subject to the custody of the legal guardian of his person and his properties are under the management of the legal guardian of his properties. But this particular Section 21 cannot, in my opinion, be held to derogate from the rights of the legal guardian of a minor's own person, I might venture to suggest that the Legislature should amend Section 21 by omitting the portion following ' child or' and by confining the rights of a minor-guardian over his wife and child to the control of their persons so far as it is necessary to exercise his conjugal right and the right of fondling his child so that he might have

no power to interfere with the management of their properties and so that the guardianship of their properties might be vested in the guardian of his own properties. We know of Hindu boys of five marrying girls of three and it does look absurd that a married boy of ten should be competent to be the guardian of his wife's person and property and that if he happens to be the senior member in an undivided family consisting of himself and his two younger brothers aged (say) five and three, respectively, he should be their guardian and the guardian of the wife of his brother aged five and the manager of her properties and of the undivided family properties of the three boys.

9. In the result, I would dismiss the appeal, with costs, extending the time for compliance with the District Court's order till the expiry of two weeks from this date. The respondent undertakes not to conduct the marriage of the minor till the latter attains the eighteenth year of his ago.

Napier, J.

10. I agree. I think that it is too late to reconsider the correctness of the decision in Reade v. Krishna (1886) 9 Mad. 391 applying the provisions of the Indian Majority Act to the right of personal custody. On the construction of Section 25 of the Guardians and Wards Act, I have5 like my learned brother, felt considerable difficulty. Undoubtedly on the strict letter of the section Mr. Srinivasa Ayyangar's contention should succeed. We have however to consider the object of the section read with the preceding section. We could not extend the powers but we can, I think, hold that the large rights given by the section include lesser rights not specifically provided for. The object of Sections 24 and 25 is to declare the right of the guardian of the person of a minor to the continuous custody of his person, and to provide a machinery for enforcing it. It can never have been intended to leave unprovided for a case where the right of guardianship had up to a certain period been vested in a different person, for the Act purports to be a consolidating Act. What has happened is that the Legislature in prescribing the machinery for enforcing a guardian's rights and stating the limitations within which it is to be exercised has used language for the circumstances in which the remedy is to be enforced in terms that strictly do not cover all the circumstances. It can never have been intended that a guardian should not be empowered to enforce his right of custody when it first arises when he can enforce it where the minor runs away or is forcibly removed. Mr. Srinivasa Ayyangar argued that these proceedings are in the nature of Habeas Corpus and must be strictly limited. I am unable to agree with the view that they are of that character. The case relied on--In the matter of Saithri I.L.R. (1892) 16 Bom. 307--is no authority for this contention. The proceedings there were of the nature of Habeas Corpus under Section 491 of the Criminal Procedure Code directed against the person alleged to be detaining the minor The learned Judge decided on the authority of the English eases that it was not a proper case for the issue of an order. The nature of the writ is stated by Coleridge, J. in a passage quoted on page 312 of the above judgment:--'Habeas Corpus proceeds on the fact of an illegal restraint.' There is no question of restraint here, nor does the section deal with such a position. Under Section 25 of this Act the order goes to the minor not to the person with whom he is residing and is independent of the question of consent or restraint. The right of a guardian to the custody of the person of a minor is clearly stated in Section 24, He is 'charged with the custody of the ward and must look to his support, etc.' It is his statutory duty, and I cannot read Section 25 which follows as limiting his powers of enforcing his right to the extreme cases of leaving or removal. In my mind those words must be read to include cases where the custody-at-law is in a certain person but the minor refuses to come or is detained. The cases where the Court has strained the language of a section to give effect to other provisions and the policy of the Act will be found in Maxwell on Interpretation of Statutes and Halsbury's Laws of England. In my opinion this is a case where it may properly be done.