

In Re: Joshy Assam

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SooperKanoon Citation : sooperkanoon.com/866354

Court : Kolkata

Decided On : Jun-05-1895

Reported in : (1896)ILR23Cal290

Judge : Sale, J.

Appellant : In Re: Joshy Assam

Judgement :

Sale, J.

1. In this matter a rule was obtained by Assam, a Chinaman, and Levee, his wife, the natural parents of a girl named Joshy, calling upon Mr. and Mrs. John Allen to shew cause why they should not deliver the child Joshy, now in their custody, to her father and mother, and why they should not pay the costs of the application. A further order was made that Mr. and Mrs. Allen should produce the child on the hearing of the rule. Cause has now been shewn on behalf of Mr. and Mrs. Allen and the child has been produced in Court.

2. Affidavits by Mrs. Allen and by three other persons have been read in answer to the allegations made by the petitioners, and Counsel have been heard on behalf of both parties. Mr. Apcar, in the course of his reply on behalf of the petitioners, stated that there were certain allegations made in the affidavits used in showing cause which he was desirous of answering. These allegations were in respect of the conduct of another daughter of the petitioners, and also as to what is alleged

to be the object of the petitioners in seeking to recover custody of the child. It seemed to me inconvenient that fresh affidavits should be filed at that stage of the case after Counsel for the parties showing cause had been heard. I thought it better, however, not to shut out any evidence the petitioners might desire to adduce, and further affidavits have now been read in reply on the part of the petitioners. I ought also to say that I intimated to the parties that, if either side desired to cross-examine all or any of the persons who have made affidavits in this matter, I should allow them an opportunity for so doing; but neither party has asked that this course should be adopted. The question now is, whether, on all the materials before the Court, an order ought to be made interfering with the present custody of the girl Joshy. The allegations upon which the rule was obtained are contained in the verified petition of Assam, a Chinaman, and his wife Levee, which states that the infant Joshy, the daughter of the petitioners, was of the age of nine years and eight months, having been born, in September 1885; that the petitioners are both of them natives of China, although at present residing in Calcutta; that they had for a long time been acquainted with Mr. and Mrs. Allen who, two years ago, requested the petitioners to allow them to become god' parents of the girl Joshy; that thereupon Assam in consultation with his wife Levee and with her consent, had the girl christened, Mr. and Mrs. Allen becoming her god-parents; that in March 1893, Assam, having occasion to go' to Penang, left his daughter Joshy under the care and protection of Mr. and Mrs. Allen; that in March of the following year Assam returned to Calcutta and demanded restoration of the girl, which was declined by Mr. and Mrs. Allen; that in August 1894 he instituted proceedings in the Police Court on a charge against Mr. and Mrs. Allen of wrongfully detaining the child for an improper purpose, which charge was dismissed; that, on the 20th May 1895, he filed his petition in this Court and obtained a rule. The allegations made in the petition are of the vaguest possible character, and certainly fail to explain satisfactorily why the parents of the child should have consented to have the girl christened, if the object was to leave her only temporarily in the care and charge of Mr. and Mrs. Allen. But a completely different complexion is placed upon the case by the affidavits of Mrs. Allen and the other deponents, viz., Elizabeth Mann, Emma Akhai and Alfred Whyte. These affidavits show that so far from the custody having been intended by the parents to

be temporary only, the parents had deliberately and finally relinquished their right of control of the child in favour of Mr. and Mrs. Allen, and had made over the girl to them to be brought up and educated and cared for by them as their own adopted child. The circumstances under which the child was made over to Mr. and Mrs. Allen are shown to be these: The parents professed themselves to be without means and unable to support and maintain the girl, and they therefore requested Mr. and Mrs. Allen to take over the girl to be brought up as a member of their own family, knowing at the time that Mrs. Allen had expressed a desire to take a suitable child in adoption. Thereupon, in January 1893, the girl was handed over to Mr. and Mrs. Allen, and on the 18th January she was, as appears from the certificate of baptism annexed to the affidavit of Mrs. Allen, christened at the Roman Catholic Church of the Sacred Heart of Jesus in the presence of the parents under the name of Minnie Allen; Mrs. Allen standing as god-mother. From the time the girl was so made over to them, she has resided with Mr. and Mrs. Allen as their daughter under the name of Minnie Allen, and no suggestion has ever been made that the girl is not properly and affectionately cared for and tended, or that she is unhappy where she is, or that any circumstances have arisen which, for the welfare or in the interest of the child, render it desirable that she should be restored to her parents. Mr. Allen, it appears, is by birth a Chinaman. He came over to this country early in life and has followed the profession of a photographer. Several years ago he became a Christian and married his present wife, who is also a Christian; the ceremony being performed at the Roman Catholic Cathedral at Moorgehatta in Calcutta; and they have throughout their married life lived together as Christians and have adopted European habits and customs in their mode of living. They are people in a well-to-do position and have both the means and the desire to bring up the girl in a respectable and comfortable manner. I have no doubt whatever that the story told by Mrs. Allen and her witnesses is the correct one, as to the circumstances under which the girl came into her custody, and the question which I have to determine is, whether, having regard to the law applicable to the case, I ought to interfere with the present custody and control of the child.

3. Mr. Apar, in his argument on behalf of the parents of the girl, relied mainly on two propositions of law : First of all he said that the rights of parents regarding the

custody and control of their offspring are paramount, and that the Court would not interfere with these rights, except on very strong grounds showing actual misconduct on the part of the parents. Secondly, he contended that, even if I were of opinion that the arrangement under which Mr. and Mrs. Allen alleged the child had been made over to them was proved, still such an arrangement was revocable, and the Court would not hold the parents bound thereby, but would assist them in regaining the custody of their child and in re-asserting their parental authority.

4. As regards the first proposition, it was no doubt the practice in the Common Law Courts not to interfere with the rights of parents as to the custody of their children except on very strong grounds, but there is also no doubt that the practice in the Courts of Chancery has been different, and that in accordance with that practice, and in the exercise of a large discretion, the Courts have interfered with the parents' right to the custody of their children, when it was clearly shown that the safety or welfare of the children required such interference. It has been pointed out that the rights and privileges of parents as to the control and custody of their children were to be exercised, not in the interest and for the benefit of the parents, but in the interest and for the benefit of the children : that is the principle which the 'Chancery Courts have followed in cases where they have been asked to exercise their powers of interference. The modern doctrine as regards the principle on which the Courts will interfere is thus stated in the 2nd Vol. of Seton on Decrees, p. 884: 'In equity a discretionary power has been exercised to control the fathers or guardians' legal rights of custody where their capricious exercise would materially interfere with the happiness and welfare of the child, or where such rights have been forfeited by conduct or acquiescence, or where the father has so conducted himself or is placed in such a position as to render it, not merely better for the children, but essential to their safety or to their welfare in some very serious and important respect, that their rights should be superseded or interfered with. 'And the case of *Queen v. Gyngall* L.R. Q.B. (1893), Vol. II, 232 illustrates the extent to which the Courts have now gone in exercising their power of interference with the parents' custody of a child, when the welfare of the child demanded it. In that case the mother was the applicant for the restoration to her of a child which was then in the custody of a Lady Superintendent of a Conventual Home. There was no

allegation of any misconduct, or any moral unfitness on the part of the mother disentitling her to the custody of the child, nor had the mother in any sense abandoned her right to the control and custody of her child; yet the Court said that the mother's position, through no fault of her own, was such as regards the circumstances under which she was earning her livelihood, and the opportunities she would have of continuing the education of the child, that it would be injurious to the welfare and interest of the child that her present custody should be interfered with. And at page 242 the Master of the Rolls says: 'That its jurisdiction to interfere with the parental right is not confined, as was argued, to cases where there has been misconduct on the part of the parent, seems to me clear from many cases. In the case of *In re Fynn* 2 De. G. and S. 457, Knight Bruce, V.C. said: 'Before this jurisdiction can be called into action, it' (i.e., the Court)' must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shewn himself, to be a person of such a description, or is placed in such a position as to render it, not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended-should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong.' That is a clear statement that the Court must exercise this jurisdiction with great care, and can only act when it is shewn that either the conduct of the parent, or the description of person he is, or the position in which he is placed, is such as to render it, not merely better but-I will not say essential, but - clearly right for the welfare of the child, in some very serious and important respect, that the parents' rights should be suspended or superseded; but that where it is so shown the Court will exercise its jurisdiction accordingly.'

5. That is the principle applicable to the case of parents who have not, by their own act, waived or abandoned, in favour of third persons, their parental authority or right.

6. But the second proposition contended for, namely, that an arrangement under which the parents have agreed to abandon the custody of their child to a third person is a revocable arrangement, requires, I think, this very important

qualification, that the Court will not allow parents, who have abandoned the custody of their children to third persons, to attempt capriciously to re-assert their rights without showing that the welfare of the children warrants and requires such action on their part. Moreover the policy of the legislature, as shewn by the various Acts passed in England for the regulation of the custody of infants, and by the Guardian and Wards Act in this country, appears to be to invest the Courts with a large discretion to be exercised for the protection of the welfare and well-being of children. I have no doubt that in a case such as the present, where the parents, in pursuance of an arrangement deliberately entered into by them, have resigned their parental authority, the Court in exercising its powers of interference with the custody of a child at the instance of the parents should be guided mainly, if not entirely, by what it conceives to be best for the welfare and well-being of the child.

7. In this case what I find is that the parents, on the plea of being unable to maintain and support the child, agree to make it over to persons who they have reason to suppose will treat the child kindly and affectionately, intending that the child should become and remain a member of the new guardian's family. Then, without any explanation or any suggestion of a change in the circumstances requiring the re-assertion of the parental authority, the parents come forward and ask to have the care and custody of the child re-committed to them. They do not pretend that the interest of the child in any sense requires that its custody should now be changed, nor do they say that the welfare of the child demands the re-exercise of the parental authority which they abandoned two-and-a-half years ago.

8. I cannot moreover close my eyes to the fact that in making the application they put forward an untrue and totally misleading account as to the circumstances under which the child came under the control of Mr. and Mrs. Allen. There can, I think be no doubt that the parents of the girl are in an entirely impecunious condition. The only regular income which they possess is a salary of Rs. 10 per month, which the mother receives for her services as an ayah, and nothing else of a definite character is alleged on the part of the parents to show that they are possessed of any means whatever to enable them to support the child.

9. On the other hand, there is no doubt the girl has for the last two-and-a-half years been brought up in a comfortable manner. She has received a Christian training, and has been educated in the Loretto School. I am now asked to make an order which will have the effect of depriving the girl of these advantages.

10. I do not think it was intended, on the part of Mr. and Mrs. Allen, that it should be alleged that the object of the parents in seeking to obtain the custody of this child was that she might be devoted to a life of immorality; but having regard to all the circumstances, I cannot help thinking that the parents in making the present application are actuated, not by a desire to secure the future well-being of the child, but by a hope of obtaining a pecuniary advantage for themselves, probably through some matrimonial alliance which they are anxious to promote. To remove the girl from her present custody would be to expose her to a method and mode of life for which her up-bringing and course of training for the past two-and-a-half years has rendered her wholly unfit. I think I should be doing a wrong to the child if, upon the facts before me, I were to make an order to restore her to her parents.

11. This rule must therefore be discharged.

Sale, J.(to Mr. Dunne.)

12. Do you press for costs

Mr. Dunne

13. I am instructed to press for costs.

Sale, J.

14. Then the rule will be discharged with costs.