**(1940) 01 AHC CK 0008**

**Allahabad High Court**

**Case No:** None

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| Mt. Lalita Twaif | | APPELLANT |
| | Vs | |
| Paramatma Prasad | | RESPONDENT |

**Date of Decision:** Jan. 5, 1940

**Citation:** AIR 1940 All 329 : (1940) 10 AWR 241

**Hon'ble Judges:** Ganga Nath, J

**Bench:** Division Bench

**Final Decision:** Dismissed

**Judgement**

Ganga Nath, J.

This is an appeal by an objector, Mt. Lalita, and arises out of proceedings under the Guardians and Wards Act. The application was made u/s 25 of the Act for the custody of the children. Paramatma Prasad opposite party (respondent) applied on the ground that he was the father of the children. The appellant denied that he was the father of the children. She also contended that she, being the mother of the children, was entitled to their custody. The learned District Judge has found that Paramatma Prasad is the father of the children and is entitled to their custody. The appellant has come here in appeal against the order of the District Judge.

2. The first contention that was raised on behalf of the appellant was that the learned District Judge had no jurisdiction, inasmuch as the minors were living in village Shadiabad in Ghazipur District at the time when the application was made. Section 9(1) of the Act lays down:

If the application is with respect to the guardianship of the person of the minor, it shall be-made to the District Judge having jurisdiction in the place where the minor ordinarily resides.

3. The fact that a minor is found actually residing at a place at the time the application is made does not determine the jurisdiction. It must be proved where the minor ordinarily resides, as laid down in Section 9(1). In the present case it has

been found that the appellant took away the minors to Shadiabad, where her parents resided, in March 1938, i.e. only three or four months, before the application was made. Before that the minors and their mother had been living for several years in Benares, where Paramatma Prasad lived, within the jurisdiction of the learned District Judge. The learned Judge has observed:

It is in evidence that she has been in Benares for the last six or seven years, though she in this period visited Shadiabad off and on. But so far as, the minors are concerned, I am of opinion that their ordinary place of residence must be held to be Benares. Both of them were born in Benares. For a major part of their lives both of them have lived in Benares. The fact that their mother belongs to Shadiabad would not make their residence also Shadiabad. Their ordinary residence must be held to be Benares, though at present they might be living with their mother at Shadiabad since March last.

4. These facts have not been controverted by the appellant. It has also been found that the appellant was living with the applicant opposite party during all this period at Benares. This fact further shows that Benares was the place where the minors should be deemed to have their ordinary residence. The mere fact that the minors were taken by their mother to Shadiabad when she went to visit it would not make Shadiabad as the place of ordinary residence of the minors. The learned District Judge of Benares had therefore jurisdiction to try the case. The learned Judge has found that the plaintiff is the father of the minors. The appellant is a prostitute, and she was living with him as his mistress. The finding of the learned Judge that the applicant is the illegitimate father of the minors has not been challenged. The next contention of the appellant was that the applicant being the father of the minors could not get himself declared as their guardian in view of the provisions of Section 19, Guardians and Wards Act. Reliance was placed on Annie Besant v. Narayaniah AIR (1914) PC 41. Section 19 of the Act lays down:

Nothing in this chapter shall authorize the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint and declare a guardian of the person;

(b) subject to the provisions of this Act with respect to European British subjects, of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor.

5. In the case referred to above their Lord-ships of the Privy Council observed at page 822:

And further, no order declaring a guardian could by reason of S, 19, Guardians and Wards Act, 1890, be made during the respondent''s life unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case.

6. There can be no doubt that no such declaration can be made in view of the provisions of S, 19 of the Act. The argument of the learned Counsel is misconceived, because the application is not u/s 19, Guardians and. Wards Act. The application is u/s 25 of the Act, which lays down:

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.

7. Under the column of "causes which have led to making of applications" in the application the following statement is made:

That the causes which led to this application are that the minors have been living with the applicant and getting proper upbringing, but the mother of the minors, who has taken to bad and immoral habits, obtained the custody of the children wrongfully and is refusing to deliver up the minors. There are grave dangers to the minors, if they are permitted to remain in the company of such a woman and in such an atmosphere.

8. Under the column of "qualifications of proposed guardian" it is stated:

The applicant is the father and natural guardian of the minors and is entitled to the guardianship of the minors.

9. There is thus no question of any such appointment or declaration of guardianship as is contemplated in Section 19 of the Act, The question of parentage arose in the present case because the fact that the applicant was the father of the minors was contested by the appellant. As already stated, it has been found that the applicant is the father of the minors. This finding has not been challenged. The dispute now between the parties is with regard to the custody of the children. The appellant claims a right to keep the children in her custody. It has been found by the learned District Judge that she is leading an immoral life. He has observed:

Paramatma''s case was that Mt. Lalta was in his favour but was being influenced by her sister, Mt. Kishen Dei, who wanted to carry on promiscuous sexual intercourse and earn money for her sister also. That this charge is correct is admitted by Mt. Kishen Dei herself. Mt. Kishen Dei said that it was true that she had no other means of livelihood and that she used to keep Mt. Lalta with her in order to live on her earnings.

10. These observations are based on the statement of Mt. Kishen Dei, and their correctness is not disputed. It will appear from the admission of Mt. Kishen Dei herself that the appellant is leading an immoral life at the instance of Mt. Kishen Dei, with whom she is living. It being so, there can be no doubt that it will not be in the interest of the children, one of whom is a girl, to be allowed to live with their mother

and Mt. Kishen Dei. Reliance was placed on behalf of the appellant on Venkamma v. Savitramma (1889) 12 Mad 67. There it was observed:

Admitting that ordinarily the mother of an illegitimate infant is entitled, during the period of nurture, to the custody of the infant, the question in this suit is whether the plaintiff is, upon the facts found by the Munsif (as to plaintiff''s conduct) in the original hearing and on the inquiry by him entitled to the custody of the infant as against the defendant who has had the custody of the child committed to her by the plaintiff. There is no reason why the principle applicable to the Mufassal of "Equity and good conscience" should not be applied to determine whether the infant should be given over to the custody of a natural guardian leading an immoral life and by whose example the morals of the child are likely to be corrupted.... But the Courts of law in England and Ireland, in cases where immoral conduct and character is proved against even a mother of a legitimate child, interfere with the ordinary legal right of the mother to the custody of the child: see Reg. v. Clarke (1857) 7 El & Bl 186 and Skinner v. Orde (1871) 14 MIA 309. It would be against equity and good conscience to deliver the infant into the custody of the plaintiff whom the Munsif has found to be a person who receives visits from men for immoral purposes and to be of immoral character.

11. This case does not help the appellant, because it having been proved that she is leading an immoral life, it will not be in the interest of the minors that they should be allowed to remain in her custody. I therefore see no reason for interference with the order of the learned District Judge. It is accordingly ordered that the appeal be dismissed with costs.