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(1986) 12 CAL CK 0001

Calcutta High Court

Case No: F. M. A. T. No. 3585 of 1986

Gopa Guha		APPELLANT
	Vs	
Rathin Guha		RESPONDENT

Date of Decision: Dec. 23, 1986

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, 141
- Guardians and Wards Act, 1890 - Section 13, 25, 25(1), 6
- Hindu Minority and Guardianship Act, 1956 - Section 6

Citation: 91 CWN 829

Hon'ble Judges: Shyamal Kumar Sen, J; A.M. Bhattacharjee, J

Bench: Division Bench

Advocate: Saktinath Mukherjee, M.A. Vidyadharan and T.K. Banerjee, for the Appellant; A.P. Chatterjee and Shanti Das, for the Respondent

Final Decision: Allowed

Judgement

A.M. Bhattacharjee, J.

The respondent-husband has filed a petition purporting to be under the provisions of Section 6 read with Section 25 of the Guardian and Wards Act, 1890, against the appellant-wife for an appropriate order enabling the husband "to retain the custody" of their minor child aged about three years and for restraning the wife "from taking out the child forcibly or by any other means from the custody" of the husband. In aid of the reliefs so prayed, the husband also filed an application for temporary injunction under the provisions of Order 39, Rules 1 and 2 of the CPC whereupon the trial court granted an exparte interim injunction restraining the wife from removing or taking away the miner from the custody of the husband and after hearing the parties the trial court has made absolute the aforesaid order of interim injunction. Being aggrieved, the wife has filed this appeal along with an application "for injunction and/or stay of operation" of the impugned order. For expedition as

well as to shorten litigation both the appeal and the application have been heard together, a course to which the learned Counsel for both the parties have readily agreed. We have derived very able and considerable assistance from the learned arguments advanced by Mr. Snakti Nath Mukherjee, the learned Counsel appearing for the appellant-wife and by Mr. Arun Prakash Chatterjee, the learned Standing Counsel appearing for the respondent-husband and having given them our best consideration, we are satisfied that we must-allow the appeal and set aside the impugned order of injunction for the reasons stated hereunder. The impugned order of temporary injunction having been passed as an interlocutory relief in respect of and with reference to the main petition u/s 6 read with Section 25 of the Guardian and Wards Act, we may at once proceed to consider the provisions thereof. Section 6 of the Act provides that in the case of a minor, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property, or both, which is valid by the law to which the minor is subject and therefore these provisions can have no. manner of application to a case where, as here, the father, who is indisputably the natural guardian and has also admittedly the actual custody of the minor, has applied for an order enabling him to "retain the custody" of the minor and no question of appointment of a guardian is in issue. Section 25(1) of the Guardian and Wards Act, which is material for the present purpose, may be re-produced for the facility of discussion which runs thus:
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.

2. The expressions Ward Leaves or is removed from the custody of a guardian, ward to return to the custody of his guardian, an order for his return and ward to be arrested and to be delivered into the custody of the guardian, would prima facie give rise to the obvious impression that these provisions are to be invoked only when the ward is no longer in the custody of the guardian whether as a result of his voluntary abandonment or his removal by force or otherwise and would not apply to a case where, as here, the father-guardian having admittedly the actual custody of his ward, applies for an order enabling him to retain the custody and for restraining others from removing the ward from his custody. As observed by Sulaiman, A.C.J., in the Division Bench decision of the Allahabad High Court in Mt. Siddiqunnisa Bibi Vs. Nizamuddin Khan and Others, . the necessary condition for the exercise of the discretion given by Section 25 is that the ward should have left or have been removed from the custody of the guardian of his person and if the ward has not left or has not been removed from such custody, it is difficult to see how the section would apply.

3. Mr. Chatterjee, apapearing for the husband-respondent has, however, urged that for the application of Section 25 of the Guardian and Wards Act, it is not necessary that the ward must be physically leaving the custody or must be physically removed from the custody of the guardian. He has referred us to the Division Bench decision of this Court in Jwala Prosad Saha Vs. Bachu Lal Gupta, where B.K. Mukherjee, J. (as his Lordship then was), speaking for the Bench, ruled (at 217) that if some person, other than the legal guardian, is in actual possession of the ward and while in such possession repudiates to the guardian''s knowledge the right of the latter to the actual or legal custody of the minor, then the ward shall be deemed to have been removed from the legal custody of the guardian within the meaning of section 25. The reason appears to be that even when the actual custody or possession of the ward is with some one, other than the legal guardian, with the knowledge and consent of such guardian, the guardian shall still, in the eye of law, be deemed to have the legal custody of the ward and any repudiation by the former of the right of the latter to the actual or legal custody of the ward, would in law amount to removal of the ward from the custody of the guardian within the meaning of section 25. But the decision in Jwala Prosad (supra) does not, as it obviously can not, go so far as to rule that where, as here, the legal guardian is also in actual custody of the ward, the ward shall still be deemed to have been removed from his custody within the meaning of section 25 if some other person repudiates the. guardian''s right to such custody without taking the ward out of such custody. At any rate, we have also not been able to agree with Mr. Chatterjee that by her letter dated 25.8.86 written to the Principal of the Creche School where the ward is admitted, being Annexure ''B'' to the husband''s affidavit-in-opposition, the wife has in any way repudiated the right of the husband to the custody of the child as all that she appears to have done by that letter is only to have authorised the niece of her husband to take the child to and from the school.

4. We must make it clear that in deciding as to whether the husband has made out a prima facie case for a temporary injunction as granted by the impugned order, we are in no way going to finally decide the merits of the main petition filed by the husband u/s 6 read with section 25 of the Guardian and Wards Act and there should be no doubt that nothing observed by us herein can take the place of final decision of the aforesaid main petition. It is true that in dealing with the question of injunction we have no doubt considered as to whether, on the allegations made in the main petition u/s 25, the respondent-petitioner can be said to have made out a probable case for the relief prayed for in that main petition, in aid whereof he has moved the court for interlocutory injunction. But as has been pointed out by Das Gupta, J. (as his Lordship then was) in the Division Bench decision of this court in Ashalata Mitra Vs. A.D. Viz, , it very often happens that in dealing with applications for temporary injunction pending disposal of suits, the court has got to come to (such) a decision though that decision never takes the place of the final decision of the suit. As has been further observed therein the fact that decision has to be made

of the matter finally in the suit, can not be a reason for not considering the matter at so early stage, if and when this is necessary for the proper decision of the application.

5. As already noted, the husband has filed this application for temporary-injunction in aid of the order of permanent injunction prayed for by him in his main petition u/s 25 of the Guardian and Wards Act and, therefore, in deciding this appeal against this impugned order of temporary injunction, we will have to decide as to whether the husband has made out a prima facie case for the relief prayed for by him in the main petition. And the husband cannot be said to have made out a. prima facie case if on the very allegations made by him in his petition u/s 25, the provisions of that section do not prima facie appear to have any application. It was pointed out by Cotton, L.J., almost a century ago in Challender v. Royle (1887 36 Chancery Division 426 at 436) that even though Court ought not on an interlocutory injunction to attempt to finally decide the question involved in the main suit, the court is nevertheless to decide, determining as to whether the plaintiff, has made out a prima facie for interlocutory injunction, as to whether, taking the allegations (sic) in the plaint to be true modoed forma, it is probable that at the hearing of the action he will get the decree in his favour and that injunctions ought to be granted only on a case made out entitling the plaintiff to that particular remedy prayed for in the suit. It may be noted that these observations of Cotton, L.J. in Challender (supra) have been quoted with approval in a decision of this court in Sheonath Singh v. Royal Calcutta Turf Club (I.L.R. 1950 1 Cal 418 at 436.

6. In the earlier decision in Preston v. Luck (1884 -27 Chancery Division 497), the same Lord Justice, in laying down the test for the grant of an interlocutory injunction, observed (at 506) that though the court is not called upon to decide finally on the rights of the parties, it is necessary that the court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiffs are entitled to relief. Applying this test, we do not think that, even accepting all the allegations made in the main petition u/s 25 of the Guardian and Wards Act to be true in their entirety, the husband-petitioner has been able to make out a prima facie case for the relief prayed therein as the petitioner being the legal guardian of the minor is also admittedly in actual custody of the minor and therefore prima facie it is not a case of ward having left or having been removed from the custody of the guardian which alone can attract the operation of Section 25. We must, therefore, hold that the learned trial Judge ought not to have granted the temporary injunction.

7. There is yet another reason for which the impugned order of injunction can not be sustained. Section 6 of the Hindu Minority and Guardianship Act, 1956, while providing that the father is the natural guardian of his minor child, nevertheless declares that "the custody of a minor who has not completed the age of five years shall ordinarily be with the mother". In matters relating to guardianship and custody

of the minors, however, what is decisive is, not the right of the guardian but the welfare of the minor and, as the provisions of Section 13 of the Act and the expression ordinarily in Section 6, quoted above, would show, notwithstanding their statutory rights, the father may be denied guardianship and the mother may be denied custody if the welfare of the minor so warrants. The welfare of the minor being thus the paramount consideration in the law of guardianship of minors, Section 6 in providing that "the custody of a minor who has not completed the age of five years shall ordinarily be with the mother" must be taken to have enacted a legislative presumption that ordinarily in case of a minor of such tender age, the custody of the mother is conductive to the welfare of the minor. In the face of such a legislative presumption staring at the face, the right of the mother to such custody is not be interferred with, whether by way of an order of injunction or otherwise, unless there are materials on record strong enough to dislodge such a presumption. We are afraid that the fact, as found by the trial court, that the mother has at present left the matrimonial home and in now residing in her brother''s house is not, by itself, strong enough to outweigh such presumption and to justify interferance with her right to the custody of her child aged about three years by the impugned order of injunction. We are accordingly satisfied that on the materials as they were before him, the learned trial Judge ought not to have passed the impugned order of injunction,

8. Before us, however, the husband-respondent has filed a further affidavit whereby our attention has been sought to be drawn to a news-item appearing in some "Evening Brie " dated 22nd November, 1986 to the effect that one alleged bawdy-house in Bhawanipore was raided by the police on 17th November, 1986 where seven girls were arrested, but that the local people complained that the police have not taken any initiative to arrest Gopa alias Suvra Bose, reported to. be another principal member of the racket". The husband has simply stated in his further affidavit "that reading the aforesaid news item. it appears that the plaintiff''s wife Smt. Gopta, who is otherwise known as Suvra Bose, is connected with the "aforesaid matter, and he has made it quite clear in his affidavit-in-reply that such statement has been made by him "only on the basis of news-items". The wife-appellant in her further affidavit-in-opposition has categorically denied any connection whatsoever with any such affair and has stated further that "according to information available, in the police report about the said incident reported, there is no mention of any one called Suvra Bose". "A news-item", as has been pointed out by the Supreme Court in Samant N. Balkrishna and Another Vs. V. George Fernandez and Others, , "without further proof of what had actually happened through witnesses is of no value" and that "such news-items cannot be said to prove themselves, although they may be taken into account with other evidence, if the other evidence is forcible". As at present, we do not find any clear, independent or otherwise forcible evidence to reasonably connect the wife-appellant with the alleged affair and, therefore, even if we could take into account this news-item as

additional evidence, it would have been quite futile to do so on the materials on record as at present. That being so, we must, as already indicated, hold that the impugned order of injunction should be quashed as the materials on record did not warrant its issuance and cannot justify its continuance.

9. A question arose during the course of argument as to whether an appeal would lie against the impugned order. The impugned order has been made on an application under Order 39, Rules 1 and 2 of the CPC by the trial Court avowedly in exercise of the powers under those provisions. That the provisions of the CPC would apply to proceedings under the Guardian and Wards Act in view of Section 141 of the Code must be taken to be the settled view since the decision of the Privy Council in Thakur Prasad, v. Sheikh Fakirullah (ILR 1895 17 All 106), which has been relied on by the Supreme Court in Dokku Bhushayya Vs. Katragadda Ramakrishnayya, . In Ramchandra Aggarwal and Another Vs. State of Uttar Pradesh and Another, , the Supreme Court has now gone much further in holding that in view of Section 141 of the CPC the Code will apply not to an original proceeding, like a suit or an application for appointment of a guardian etc., but would also apply even to a proceding which may not be original in nature. We are satisfied that on the allegations made therein, the proceeding initiated by the husband-respondent by his petition u/s 25 of the Guardian and Wards Act, amounts to a proceeding for restraining the opposite party from committing injury of any kind within the meaning of Order 39 Rule 2 of the CPC and therefore an appeal would lie against the impugned order under Order 43 of the Code read with Section 141 thereof. If any authority is at all necessary for this proposition reference may be made to the decision of the Nagpur Court in Muhammad Wasir v. Muhammad Abdul (AIR 1919 Nag 273).

10. We, therefore, for the reasons stated hereinbefore, allow the appeal and set aside the impugned order of injunction, but we, however, make no order as to costs. No separate order is, therefore, called for on the application of the wife-appellant for interlocutory injunction or stay of operation of the impugned order to operate during the pendency of this appeal. A copy of our order to go to the Court below forthwith.

Shyamal Kumar Sen, J.

I agree.