
(1870) 01 CAL CK 0019

Calcutta High Court

Case No: Special Appeal No. 1764 of 1869

Mussamat Harasundari
Baistabi

APPELLANT

Vs

Mussamat Jayadurga
Baistabi and Others

RESPONDENT

Date of Decision: Jan. 27, 1870

Judgement

Sir C.P. Hobhouse, J.

We think that, in this case, the proceedings of the Court below must be set aside as proceedings held without jurisdiction, The plaintiff in this suit sought to obtain possession of the person of her daughter, a minor, found to be of the age of ten years. Her statement was that she had left the minor daughter in question in temporary charge of the defendants while she was absent, ill, and now on her return they refused to give the daughter up. Their statement was that the daughter in question had been gifted to them by the plaintiff. But whatever may have been the statements on either side, the fact remained that the thing in dispute was the custody of a female minor of tender years. Now in Act XL of 1858, it is declared generally by section 2 that the care of the persons of all minors is subject to the jurisdiction of the Civil Courts. But by the provisions of Act IX of 1861, there are more express declarations as to the custody and guardianship of minors, and by section 1 of that Act it is enacted that "any relative of a minor who may desire to prefer any claim in respect of the custody of such minor must make "application to the Principal Civil Court of original jurisdiction in the "district by which such application, if preferred in the form of a regular suit, would be cognizable." When, therefore, the matter substantially in dispute between the parties to this suit was the custody of the person of the female minor in question, the application should have been made to the Principal Civil Court of original jurisdiction in the district, and such Court alone had, by the Act in question, jurisdiction to entertain such an application, and dispose of it. This being so, we think that the Court below as a Court exercising appellate jurisdiction, and the Court of the Moonsiff not being a Principal Civil Court of the district exercising original jurisdiction, had no jurisdiction to entertain this particular suit before us, and we, therefore, set aside

the decisions of both Courts as decisions passed without jurisdiction. Still the fact remains that this was in reality an application for the custody of the person of the female minor, and from certain findings of the first Court it would seem as if application for such custody had been made for the purposes (both on the one side and on the other) of leading to the demoralization of the minor in question. The first Court finds that the parties to this suit are public prostitutes, and the daughters "given and taken by them are intended to be prostitutes;" and then the Court goes on to say that although it is true that the plaintiff is demanding her daughter with the intention of making her a public prostitute, yet she being the natural mother cannot be deprived of the custody of her daughter," But we do not so read the law. The care of the persons of minors is declared to be in the Civil Courts, that they have jurisdiction in the matter of such case, and the custody of the persons of such minors, when that custody is in dispute, is declared by Act IX of 1861, and especially by section 1 of that Act, to be within the jurisdiction of the principal Civil Court of original jurisdiction of the district. Whilst, therefore, we set aside the decisions of the Courts below as passed without jurisdiction, we direct that the record be sent to the principal Civil Court of original jurisdiction, that is to the Civil Judge, that he may entertain the petition of the plaintiff as an application under the provisions of Act IX of 1861, and that he dispose of the question of the custody of the minor in accordance with the provisions of that Act.

2. We would call the attention of the Judge to the fact that, under the provisions of section 2 of the Act, he would appear to have power to provide at once for the proper custody of the minor, pending the suit; and that under the provisions of section 3 of the said Act, he is, in the words of the said Act, empowered to make such order as he shall think fit in respect of the ultimate custody of the minor.

3. We think in the matter of costs, so far as this case has gone, that each party must pay his own costs in all the Courts. The Judge must treat the evidence on the record as if it were no evidence at all, and must enquire into the matter before him altogether de novo.