APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Rachhpal Singh

1936
May, 12

SHEO KUMARI AND OTHERS (OPPOSITE-PARTIES) *v.* MATHURA RAM (APPLICANT)*

Guardians and Wards Act (VIII of 1890), section 25—Custody of minor wife—"Constructive custody" of guardian—No such constructive custody of the husband where the wife had never lived with him and he had obtained a decree for restitution of conjugal rights.

Where the wife, who was a minor, had never lived with her husband; and the husband, having obtained a decree for restitution of conjugal rights, thereafter applied under section 25 of the Guardians and Wards Act for the custody of the minor wife—

Held, that the application was not maintainable, as, in the circumstances, the case could not be deemed to be one where the wife had left, or been removed from, the custody of the husband, within the meaning of section 25. The fiction of constructive custody might be applicable to the case of a parent and child though the child might never have been in the actual custody of the parent, but it would be wrong to apply it to the case of a husband and wife in such circumstances. It would be an unfair and unjust exercise of discretion to allow the husband to obtain custody of the wife in this way, when he could not be allowed to do so under his decree for restitution of conjugal rights.

Mr. *Ambika Prasad,* for the appellants.

Messrs. *K. Verma* and *K. N. Gupta,* for the respondent.

SULAIMAN, C.J., and RACHHPAL SINGH, J.:—This is a Letters Patent appeal arising out of proceedings taken by Mathura Ram under section 25 of the Guardians and Wards Act.

The facts which have given rise to these proceedings can very briefly be stated as follows: Mathura Ram instituted a suit in the civil court for restitution of conjugal rights. He alleged that Mst. Sheo Kumari had been married to him. The suit, it appears, was

*Appeal No. 2 of 1936, under section 10 of the Letters Patent.

contested by Mst. Sheo Kumari, who is a minor, but it was decreed and the decree of the first court was confirmed in second appeal by this Court. After the termination of the proceedings in the civil case Mathura Ram made an application to the District Judge in which one of the prayers was that he should be appointed guardian of his wife Mst. Sheo Kumari. That application has been refused. The other prayer made by him was that he should be given the custody of his wife. The application was opposed by Mst. Sheo Kumari. The learned District Judge by his order, dated the 18th of August, 1934, allowed the application and directed that the custody of Mst. Sheo Kumari be given to her husband Mathura Ram. An appeal was preferred by Mst. Sheo Kumari against this order which was heard by a learned single Judge of this Court who dismissed it, and the present Letters Patent appeal has been preferred against that order.

The order passed by the learned District Judge shows that the wife had, as a matter of fact, never lived with her husband. The learned Judge in his order observes: "The applicant had never had the custody of his wife. Before, I had some doubt as to whether he could seek the aid of the court under section 25 of the Guardians and Wards Act. But on further consideration, I am inclined to think that there is no reason to restrict the meaning of the word "custody" in section 25 to the physical or actual custody of the minor. Even if the ward is in the actual custody of another person, he or she would be under the guardian's constructive custody." We have heard learned counsel appearing in this appeal on both sides, and after a consideration of the matter we are of opinion that the order passed by the learned District Judge which has been confirmed by the learned single Judge of this Court cannot be sustained. A perusal of the judgment of the learned single Judge of this Court would go to show that he himself had doubts whether an order under the provisions of section 25 of

1936

SHEO KUMARI v. MATHURA RAM

the Guardians and Wards Act was competent. He has, however, referred to several cases and considered that he was justified in maintaining the order of the learned District Judge in view of the observations made in some of those rulings. The learned single Judge refers to the case of *Tatamma* v. *Marina Veerraju* (1), in which it was held that "Even where the minor has never been in the custody of the guardian, in order to make the Act workable a fiction must be imported into section 25 whereby it is deemed that the child has been constructively in the guardian's custody and has left it."

In our view the cases on which the learned single Judge of this Court relied can be distinguished. Those were cases where the question was whether a parent could be said to be in constructive custody of a minor child. The facts of the case before us are, however, altogether different. In this case the husband went to court on the allegation that his wife, though married to him, would not come and live with him. A decree for restitution of conjugal rights has been passed against her. If the husband were to go to the civil court with a prayer that he should be permitted to take forcible custody of his wife, such a prayer will never be granted. The husband knows that it will be futile on his part to go and move the civil court and request that he should be allowed to take possession over the person of his wife. His only remedy would be to get an attachment against the property of his wife if she has any. It would be in our opinion altogether wrong to permit the plaintiff to achieve his object by making an application under the provisions of section 25 of the Guardians and Wards Act. Section 25 enacts that "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

(1) A.I.R., 1930 Mad., 19.

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." Having regard to the special circumstances of the case before us to which we have made a reference above, we are not prepared to hold that it is a case where the wife of the applicant left him or was removed from his custody. The fiction referred to above may be applicable or may be enforced in cases where the dispute is as regards the custody of a minor child removed from the custody of his parents. But it will be wrong to apply that rule to a case between husband and wife. In our opinion it will be unfair and unjust in a case of this description to pass an order that the husband should be allowed to take custody of the wife, when we know that under the decree which he has obtained for restitution of conjugal rights he will not be able to get that privilege. In any case as the matter is discretionary we would not exercise our discretion in his favour. In these circumstances we are of opinion that this appeal should be allowed. For the reasons given above we allow this appeal and set aside the order passed by the learned District Judge.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Niamat-ullah and Mr. Justice Collister

EMPEROR *v.* DEOKINANDAN*

1936
May, 14

Evidence Act (I of 1872), section 25—Confession—"Police officer"—Village chaukidar—Confession made to a chaukidar inadmissible in evidence—N.-W. P. Village and Road Police Act (XVI of 1873), sections 5, 6—Police Act (V of 1861), sections 7, 47—Police Regulations, paragraphs 371, 373.

Held, by the Full Bench (SULAIMAN, C. J., *dubitante*), that a village chaukidar appointed under Act XVI of 1873 is a police officer within the meaning of section 25 of the Evidence Act,

*Criminal Appeal No. 155 of 1936, from an order of T. N. Mulla, Sessions Judge of Allahabad, dated the 6th of February, 1936.