APPELLATE CIVIL

Before Mr. Justice Ganga Nath

LALITA (OBJECTOR) *v.* PARATMA PRASAD (APPLICANT)* 1940 *January*, 5,

Guardians and Wards Act (VIII of 1890), sections 19, 25—Application by father for custody of his minor children—Maintainability—Illegitimate children—Mother's preferential right to custody of illegitimate children is lost if she is leading an immoral life—Welfare of the minors—Guardians and Wards Act, section 9(1)—"Ordinarily resides"—Jurisdiction.

Although, in view of the provisions of section 19 of the Guardians and Wards Act, the father of a minor cannot be appointed and declared guardian of the person of the minor, yet the father can as a natural guardian take proceedings under section 25 of the Act for the custody of such minor.

Although ordinarily the mother of illegitimate minor children may be entitled to their custody, yet in the interest of the minors they may be removed from her custody where she is leading an immoral life and made over to the custody of the father.

The District court within whose jurisdiction the minor "ordinarily resides", as laid down by section 9(1) of the Guardians and Wards Act, is the court having jurisdiction to entertain an application under section 25 of the Act by the father of minor children for their custody. The fact that a minor is found actually residing at a particular place at the time the application is made does not determine the jurisdiction.

Messrs. *S. C. Das* and *Satya Narain Prasad*, for the applicant.

Mr. *S. N. Verma*, for the opposite party.

GANGA NATH, J.:—This is an appeal by an objector, Mst. Lalita, and arises out of proceedings under the Guardians and Wards Act. The application was made under section 25 of the Act for the custody of the children. Paratma Prasad, 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

*First Appeal No. 111 of 1939, from an order of K. N. Wanchoo, District Judge of Benares, dated the 28th of January, 1939.

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District Judge has found that Paratma 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.

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 court having jurisdiction in the place where the minor ordinarily resides."

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 Paratma 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."

These facts have not been controverted by the appellant. It has also been found that the appellant was living with the applicant respondent 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 appellant 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 of the Guardians and Wards Act. Reliance was placed on *Annie Besant* v. *Narayaniah* (1). Section 19 of the Act lays down: "Nothing in this chapter shall authorise 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."

In the case referred to above their Lordships of the Privy Council observed at page 822: "And further, no order declaring a guardian could by reason of the 19th section of the 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."

There can be no doubt that no such declaration can be made in view of the provisions of section 19 of the

(1) (1914) I.L.R. 38 Mad. 807.

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Act, The argument of the learned counsel is misconceived, because the application is not under section 19 of the Guardians and Wards Act. The application is under section 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."

Under the column of "causes which have led to making of application" 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."

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."

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

These observations are based on the statement of Mst. Kishen Dei and their correctness is not disputed. It will appear from the admission of Mst. Kishen Dei herself that the appellant is leading an immoral life at the instance of Mst. 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 Mst. Kishen Dei. Reliance was placed on behalf of the appellant on *Venkamma* v. *Savitramma* (1). 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 Mufassil 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 *The*

(1) (1888) I.L.R. 12 Mad. 67.

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Queen v. *Clarke* (1) and *Skinner* v. *Orde* (2). 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."

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.

FULL BENCH

Before Mr. Justice Iqbal Ahmad, Mr. Justice Bajpai and Mr. Justice Braund

COMMISSIONER OF INCOME-TAX (APPLICANT) *v.* INDRA SEN RAIZADA (OPPOSITE PARTY)*

1940

January, 10

Income-tax Act (XI of 1922), sections 4(3)(vii), 6, 24—Owning race horses and running them in races—Betting on horse races—Whether amounts to "business", "profession", or "occupation"—Whether such income "casual and non-recurring"—Whether resulting loss can be set off against other income—Income-tax Act, section 66—Statement of case to the High Court—Requirements of a proper statement.

The assessee was a well-to-do moneylender and dealer in precious stones. He owned three race horses, maintained a racing stable, and entered his horses in races. He made bets in races on his own horses and also on other horses. In his account books he maintained a "racing account", in which the stakes won by his horses and his winnings on bets were entered on the credit side, and the expenses incurred in the maintenance of the stable and the entry fees, etc. as well as the losses on bets were entered on the debit side. In the accounting year the entries showed a net loss of Rs.7,458 in betting and of Rs.425 in the racing establishment, and the assessee claimed that these losses should be set off against his profits from the moneylending and jewellery business. This claim was disallowed by the Income-tax authorities and ulti-

*Miscellaneous Case No. 636 of 1936.

(1) (1857) 7E. and B. 186. (2) (1871) 14 M.I.A. 309.