MISCELLANEOUS CRIMINAL

Before Mr. Justice Bisheshwar Nath Srivastava

DEPUTY COMMISSIONER, GONDA (APPLICANT) *v.* NAWAB MOHAMMAD SHIKOH AND ANOTHER (OPPOSITE-PARTY)* 1934 *May*, 11

Criminal Procedure Code (Act V of 1898), section 491—Habeas Corpus directions—U. P. Court of Wards Act (IV of 1912), section 15—Court of Wards assuming superintendence—Deputy Commissioner constituted legal guardian of minor Ward—Guardian and Wards Act (VIII of 1890), sections 39, 40, 41 and 42—"Guardian" in section 41 refers to guardians other than those appointed by court—Termination of rights of guardians appointed by instrument—Withholding minor from legal guardian by guardian whose rights have terminated, whether constitutes illegal detention—Issue of directions in the nature of habeas corpus *under section 491, Criminal Procedure Code, whether justified—Relief under section 491, Criminal Procedure Code, whether to be refused, if other remedies open.*

Under section 41(1) (*b*) of the Guardian and Wards Act the rights of a validly constituted guardian of the person of a minor come to an end by the Court of Wards assuming superintendence of the person of minor. So the action of a guardian whose rights have thus terminated in withholding the minor from the Deputy Commissioner, who is the legal guardian by virtue of the notification under section 15 of the Court of Wards Act, constituties an illegal detention justifying the issue of directions in the nature of *habeas corpus* by the High Court under section 491 of the Code of Criminal Procedure.

There is nothing in the context of section 41 of the Guardian and Wards Act to justify the contention that the term "guardian" as used in that section must be limited to guardians appointed by the Court. On the contrary clause (*d*) of that section shows quite clearly that it refers not merely to a guardian appointed or declared by the Court but also to other guardians. The scheme of the Act in regard to termination of guardianships as disclosed by sections 39, 40, 41 and 42 also leaves no doubt that the provisions of section 41 apply to persons who claim to be guardians appointed by an instrument.

*Criminal Miscellaneous Application No. 62 of 1934, under section 491 of the Code of Criminal Procedure for issue of direction of the nature of a *habeas corpus*.

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Mushaf Husain v. *Mohammad Jawad* (1), and *Dayabhai Raghunath Das* v. *Bai Parvati* (2), relied on.

If the provisions of section 491 of the Code of Criminal Procedure are satisfied there is no reason to refuse the expeditious relief provided for in that section merely because it is possible for the applicant to seek other remedies. *Summuswami Goundan* v. *Kamakshi Ammal* (3), referred to.

The Government Advocate (Mr. *G. H. Thomas*), for the opposite party.

The Rt. Hon. Sir *T. B. Sapru*, Dr. *J. N. Misra*, Messrs. *Hyder Husain, Ali Zaheer, Ali Jawwad* and *M. P. Srivastava*, for the applicant.

SRIVASTAVA, J.:—This is an application by the Deputy Commissioner of Gonda, under section 491 of the Code of Criminal Procedure for issue of directions of the nature of a habeas corpus.

The facts of the case are that on the 12th of December, 1933, a notice was issued under section 8(2) of the United Provinces Court of Wards Act (IV of 1912) to the Raja of Utraula to show cause why he should not be declared a disqualified proprietor under section 8(1)(*d*)(i) of that Act. The Raja sent a reply showing cause why the declaration should not be made. He also executed a deed of trust in respect of his property on the 19th of December, 1933, which was followed by a supplementary deed of trust executed on the 3rd of February, 1934. The Local Government eventually on the 12th of February, 1934, declared the Raja incapable of managing his property in accordance with the provisions of clause (*d*)(i) of sub-section 1 of section 8 of the Court of Wards Act, and made a notification to that effect under section 15 of the said Act on the 15th of February, 1934. The Raja died on the 4th of March, 1934, leaving a widow Rani Hazur Ara Begum, two minor sons, Raja Mustafa Ali Khan aged 11 years and Kunwar Ikbal Ali Khan aged 7 years and a minor daughter. On the 29th of March, 1934, the Court of Wards

(1) (1918) 21 O.C., 194. (2) (1915) I.L.R., 39 Bom., 438.
(3) (1929) I.L.R., 53 Mad., 72.

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assumed superintendence of the persons and property of the two minor sons just mentioned, under section 12(2) of the Court of Wards Act and published a notification to that effect under section 15 of the said Act.

The present application has been made by the Deputy Commissioner of Gonda as Manager of the Court of Wards in charge of the person and property of Raja Mustafa Ali Khan and Kunwar Ikbal Ali Khan, minors. The case as presented on his behalf is that the late Raja Muhammad Mumtaz Ali Khan was living with his wife and children at Utraula in district Gonda and died there. His widow is still living there but on the 16th or 17th of March, 1934, the two minor sons of the late Raja were secretly removed from the house at Utraula. When the Deputy Commissioner, claiming to be the guardian of the person of the aforesaid minor sons, tried to secure them in his custody, Nawab Muhammad Shikoh opposite party no 1 and Rani Hazur Ara Begum instituted a suit for an injunction on the 21st of March, 1934, in the Court of the Munsif North Lucknow and obtained a temporary injunction restraining the Deputy Commissioner from getting custody of the minors. This suit was dismissed on the 28th of April, 1934, on the ground that the notice required by section 80 of the Code of Civil Procedure and section 54 of the Court of Wards Act had not been given. Immediately after the dismissal of the suit the Deputy Commissioner again tried to get the minors in his custody but Nawab Muhammad Shikoh and Mr. Asghar Hasan opposite-parties refused to hand over the boys to him and alleged that they were legally entitled to the custody of the minors, in their right as trustees appointed by the late Raja Muhammad Mumtaz Ali Khan, for their education and upbringing. It is alleged on behalf of the applicant that as the Court of Wards assumed superintendence not only of the property but also the persons of the minors, the Deputy Commissioner as Statutory guardian is legally entitled to the custody of the minors and the conduct of the opposite party in withholding

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the minors from his custody, constitutes an illegal restraint which entitles the applicant to relief under section 491 of the Code of Criminal Procedure.

The two deeds of trust, dated the 19th December, 1933, and the 3rd of February, 1934, form part of the record of the suit for injunction decided by the Munsif North, Lucknow. The file of this case has been summoned and is before me. The learned Government Advocate denied the genuineness and validity of the aforesaid deeds of trust, but agreed that the present application might be decided on the assumption that they are genuine.

The application has been warmly contested by the opposite party. They contend that under the provisions of the deeds of trust, they have been appointed trustees in respect of the entire property left by the Raja and have been charged with the duty of making proper arrangements for the education and upbringing of his minor children. It is further contended that on the 15th of February, 1934 when the Court of Wards assumed superintendence of the property and persons of the two minor sons, the legal ownership in the estate was vested in the trustees and the assumption of superintendence by the Court of Wards was therefore altogether illegal and invalid.

The first contention urged on behalf of the applicant is based on section 53 of the Court of Wards Act. It is argued that the opposite party is debarred by the provisions of this section from questioning the discretion of the Court of Wards in assuming superintendence of the person and property of the minors. This argument appears to me to be fallacious. There is a fine but clear distinction between the exercise of a discretion and the exercise of a right. The distinction appears to have been clearly recognized by the Legislature itself in the provisions of the Court of Wards Act. Section 12(2) of the Act under which action was taken in the present case, provides that the Court of Wards "may in

its discretion" assume or refrain from assuming the superintendence of the property or person of any proprietor disqualified under clause (*a*) of section 8. Section 13 lays down that in case "the right of the Court of Wards to assume or retain superintendence of the person or property of any disqualified proprietor" is disputed the case shall be reported to the local Government. So it will be seen that while section 12(2) expressly refers to the exercise of discretion, section 13 make provision for cases where exercise of the right is in question. The opposite party in this case challenge the right of the Court of Wards to assume superintendence of the person or property of these minors. Their contention, as stated before, is that under the deed of trust executed by the late Raja, the legal estate in the property vested in the trustees who were also duly constituted guardians of the person of the minors, and that under the circumstances the Court of Wards had no right to assume superintendence either of the property or persons of the minors. This being the position section 53 cannot help the applicant.

In this summary proceeding and in the absence of any evidence on either side, it would not be proper for me to express any opinion about the rights claimed by the opposite party under the deeds of trust or about the right of the Court of Wards to take action under the Court of Wards Act. The matter will have to be dealt with either by the Local Government under section 13 or by the Civil Court. I would only observe that the rights of the opposite party as regards the guardianship of the person of the minors do not stand on the same footing as their rights as trustees of the property. If the legal ownership in the estate has vested in the trustees, the Court of Wards cannot assume charge of the estate treating it as the property of the minors. But assuming that the late Raja constituted the opposite party guardians of the person of the minors, "it is one of the eminent prerogatives of the Crown, which implies in the monarch, the guardianship of infants

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paramount to that of their natural parents." It is on this principle that section 39 of the Guardian and Wards Act allows the Court to remove a guardian appointed by will or other instrument and to appoint another guardian in his place. It has been argued that the power given under section 39 has to be exercised judicially. It seems to me that if the Legislature can invest a Court with such authority, there is no reason why it cannot invest the Court of Wards with authority to assume superintendence of the person of a minor in spite of the existence of a guardian appointed by will or other instrument. I am strengthened in this opinion by the provisions of section 41 of the Guardian and Wards Act which provides that "the powers of the guardian of the person cease . . .

"(*b*) by the Court of Wards assuming superintendence of the person of the ward."

Thus even if the opposite party were the validly constituted guardians of the person of the minors, their powers must be deemed to have come to an end as soon as the Court of Wards made the notification assuming superintendence of the persons of the two minors before me. It has been strenuously argued that section 41 is confined to the case of a guardian appointed by Court. I regret I cannot accede to this argument. The word "guardian" has been defined in section 4 clause (2) of the Act as meaning "a person having the care of the person of a minor or of his property or of both his person and property". There is nothing in the context to justify the contention that the term "guardian" as used in this section must be limited to guardians appointed by the Court. On the contrary clause (*d*) of the section shows quite clearly that it refers not merely to a guardian appointed or declared by the court but also to other guardians. The scheme of the Act in regard to termination of guardianship as disclosed by sections 39, 40, 41 and 42 also leaves no doubt in my mind that the provisions of section 41 apply to persons in the position of the opposite party who claim to be guardians

appointed by an instrument. The sections just mentioned show that guardianship can be terminated either by removal or by discharge or by cessation of authority of the guardian. These sections also show that they deal with three classes of guardians, namely, (1) guardians appointed or declared by the Court, (2) guardians appointed by will or other instrument and (3) guardians under the personal law of the ward. Whenever the Legislature has made reference to either one or two of these three classes it has used appropriate words to indicate it but where the intention is to make reference to guardians of all the three classes, then it has merely used the word "guardian", which according to the definition is comprehensive enough to include them all. If it was intended that the word "guardian" used in section 41 should be limited to a guardian appointed or declared by the Court, I can see no reason why the words "guardian appointed or declared by the Court" which have been used in sections 39 and 40 were not used in section 41 also. A similar view was taken as regards the interpretation of the word "guardian" used in section 25 of the Act in *Mushaf Husain* v. *Mohammad Jawad* (1). and *Dayabhai Raghunathdas* v. *Bai Parvati* (2). I have therefore no hesitation in holding that under section 41(1)(*b*) of the Guardian and Wards Act the rights of the opposite party, assuming them to be validly constituted guardians of the person of the minors, have come to an end by the Court of Wards assuming superintendence of the persons of the minors. So the action of the opposite party in withholding the minors from the Deputy Commissioner who is the legal guardian by virtue of the notification under section 15 of the Court of Wards Act, constitutes an illegal detention justifying the issue of directions by this Court under section 491 of the Code of Criminal Procedure.

It was also argued on behalf of the opposite party that the Court should not exercise its powers under section

(1) (1918) 21 O.C., 194. (2) (1915) I.L.R., 39 Bom., 423.

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491 of the Code of Criminal Procedure in favour of the applicant as other remedies were open to him. The argument proceeded that the more appropriate remedy for the applicant was to seek relief under the Guardian and Wards Act. Reference was made to an unreported judgment of Mr. Justice Benett in Miscellaneous Case no. 533 of 1933—*Musammat Haidri Begum* v. *S. Jawad Ahi Shah*—decided on the 20th of December, 1933. It was remarked in this case that where there is a special Act dealing with a special subject, resort should be had to that Act instead of to a general provision. A contrary view was taken by a Bench of the Madras High Court in the matter of *Thangathayee Ammal, a minor Subbuswami Gounden* v. *Kamakshi Ammal* (1). In Bailey's Habeas Corpus page 574 it has been observed that "the right of habeas corpus is frequently resorted to to obtain the custody of children and often times to determine the rights of parties to their custody". It has for centuries been esteemed as a valuable defence of personal freedom. In fact the English Habeas Corpus Act of Charles II has often been described as the Magna Charta of British liberty. If the provisions of section 491 of the Code of Criminal Procedure are satisfied, I can see no reason to refuse the expeditious relief provided for in that section merely because it was possible for the applicant to seek other remedies. However, in the present case the right of the applicant to get any relief under the Guardian and Wards Act seems to me to be very doubtful. Section 25 of that Act which has been referred to in this connection deals with the case of a ward who "leaves or is removed from the custody of a guardian of his person." In this case it is common ground between the parties that the minors were brought to Lucknow on the 16th or 17th March about twelve days before the Court of Wards assumed superintendence of their person. It seems very doubtful if section 25 can have any application to such a case in which the ward never

(1) (1929) I.L.R., 53 Mad., 72.

came in the custody of the guardian, and could not therefore be said to have left it or been removed from it.

Another argument urged by the learned counsel for the opposite party was that the exercise of powers under section 491 of the Code of Criminal Procedure is discretionary and that those powers should not be exercised in favour of the applicant unless I was satisfied that would be conducive to the interest and welfare of the minors to do so. It was also pointed out that the consideration of natural right and parental affection and duty is a matter of the utmost importance. In this connection reference was made to the following observations contained in an American case quoted in Bailey on Habeas Corpus at page 593:

> "The experience in this country is not that wealth, especially when coupled with indulgence, is always most conducive to a useful education and the foundation of the best character. We apprehend that the best part of the child's education will not be obtained at some ideal social institute beginning with the kindergarten and ending with the University but generally at the hearth alone of its family if that family be a proper one. The welfare of the child is not merely training its head but includes training of his heart."

The argument has left me unimpressed. As we know, the father of the minors is dead. The mother, who is a *pardanashin* lady living in Utrauli, herself allowed the sons to go and stay in Lucknow with the opposite party no. 1 who is her brother. For about two months the sons have been living in Lucknow apart from their mother. I am told that they are being kept in Lucknow for the purpose of education. I have little doubt that the Deputy Commissioner would be able to make better arrangements for the education and upbringing of the children. It is not possible to compare the atmosphere of an Indian home and the conditions at the hearth of a taluqdar's family with the atmosphere

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and conditions obtaining in a European family. No evidence has been led in the case on either side but looking at the matter broadly on *prima facie* considerations I feel satisfied that in the long run it would be more to the interest and welfare of the minors that the Court of Wards should have charge of their education and upbringing rather than its being left in the hands of their Nawab maternal uncle.

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The result therefore is that I allow the application and direct that the minors, Raja Mustafa Ali Khan and Kunwar Ikbal Ali Khan be released by the opposite party from their custody and, being minors of tender years, be handed over to the custody of their lawful guardian, the applicant.

Application allowed.

APPELLATE CRIMINAL

Before Mr. Justice Rachhpal Singh and Mr. Justice G. H. Thomas

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SHEORATAN AND ANOTHER (APPELLANTS) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

Evidence Act (I of 1872), sections 24 and 30—Confession by young man without implicating himself—Confession retracted—Re-tracted confession, value of, against co-accused—Accused having sufficient opportunity to think before making confession—Presumption of voluntariness of confession—Court to decide whether confession was reliable.

Where a confession has been made by an accused person after he has been given an opportunity to think over his position, the court may be justified in drawing the presumption that it was made voluntarily. But this fact does not relieve it from its duty of carefully considering the nature of the confession made and the value to be attached to it. The court in such cases should very carefully scrutinize the confession and then decide for itself whether it is one which appears to be reliable and trustworthy.

*Criminal Appeal No. 144 of 1934, against the order of Pandit Damodar Rao Kelkar, Additional Sessions Judge of Kheri, dated the 17th of May, 1934.