

(1933) 12 BOM CK 0013
In the Bombay High Court
Case No : O.C.J. Miscellaneous No. 99 of 1933

Noshirwan Manekshaw Nanavati

APPELLANT

Vs

Sharoshbanu Noshirwan Nanavati

RESPONDENT

Date of Decision : 14-12-1933

Acts Referred:

Guardians and Wards Act, 1890 — Section 25

Citation : AIR 1934 Bom 311 : (1934) 36 BOMLR 668 : (1934) ILR (Bom) 724

Hon'ble Judges : B.J. Wadia, J

Bench : Single Bench

Judgement

B.J. Wadia, J.—This is a petition by a husband against his wife u/s 25 of the Guardians and Wards Act for the custody of their minor son who is nearly six years of age. The petitioner was married to the respondent in or about February, 1927, and the minor was born on January 24, 1928. The petitioner alleges in paragraph 7 of the petition that the minor has been removed from his custody, and that he has been deprived of the custody of his child by the respondent. A preliminary point was taken by counsel for the respondent that this application by way of petition was not competent to the petitioner, and that his proper remedy, if any, was by means of a substantive suit. Counsel contended that Section 25 of the Act had no application to the facts of this case, for the minor had neither left nor been removed from the custody of the petitioner as the guardian of his person; in fact, ever since his birth, the minor and his mother have been living in the house of the minor's maternal grandfather. Counsel relied on a decision of the Appeal Court in Achratlal Jekisandas v. Chimanlal Parbhudas ILR (1916) Bom. 600 : 18 Bom L.R. 582 In that case the minor's maternal grandfather, Parbhudas Ghelabhai, was appointed guardian of the person and property of the minor by the District Court of Ahmedabad in 1910. Parbhudas died in 1912 and his son the petitioner who was the maternal uncle of the minor prayed to be appointed guardian of the person and property of the minor. The father of the minor opposed the claim on the ground that he was better qualified than the petitioner to be the minor's guardian. The District Court appointed the

Deputy Nazir as the guardian of the minor's property, but passed no order as to the guardianship of his person. Subsequently, the father made an application under the Guardians and Wards Act for the custody of his minor son, but the application was dismissed. The father appealed to the High Court, and Scott C. J. held that Section 25 had no application, for the ward had never left nor been removed from the custody of his guardian, and that "on the peculiar facts" of the case the only remedy of the father was to have filed a suit. It was argued that the facts of the present petition are similar, and the petitioner should be relegated to a suit if so advised.

2. The decision in *Achratlal Jekisandas*" case would be binding upon this Court, if the present facts were similar, but, in my opinion, they are not. In that case the maternal grandfather was appointed guardian of the minor's person in supersession of the father in 1910 by the Court. The father never had the custody of the minor, and, therefore, the minor could not be deemed to have left nor to have been removed from such custody. It is true that in the affidavit in support of the present petition the petitioner does not state when the minor was removed from his custody, but it is alleged in paragraph 6 of the petition that the petitioner lived with his wife and the child in the bungalow of his father-in-law for nearly two years, viz., from January, 1931, till about December, 1932, and that he thereafter lived apart and called upon the respondent to come with the child and live with him. The particular manner in which, as alleged, the petitioner lived in the house of his father-in-law during those two years is to my mind immaterial. As the father, the petitioner is the natural guardian of the minor child, and he had the custody, in any event during those two years. Under the Act the word "guardian" has been defined as meaning a person having the care of the person of a minor or of his property or both. The word is used in a wide sense. It does not necessarily mean a guardian duly appointed or declared by the Court, but includes a natural guardian, or even a *de facto* guardian; see also *Dayabhai Raghunathdas v. Bai Parvati* ILR (1915) Bom. 438 : 17 Bom. L.R. 382 A natural guardian is entitled to apply u/s 25 for the custody of the minor, provided of course that the ward has left or is removed from his custody; it has even been held that such an application is his only remedy. According to the decision in *Besant v. Narayaniah* ILR (1914) Mad. 807 : 16 Bom. 625 a suit *inter partes* is not the form of procedure prescribed by the Act for proceeding in a District Court in the matter of the guardianship of infants; though Scott C. J. observed in *Achratlal Jekisandas*" case at p. 604, that this dictum of the Privy Council was not intended to be of such general application as virtually to override the decision in *Sharifa v. Mune Khan* ILR (1901) Bom. 574 namely, that a suit will lie for the custody of a minor.

3. With regard to the word "custody" in Section 25, it has been held in *Ibrahim Nachi v. Ibrahim Sahib* ILR (1915) Mad. 608 and *Ulfat Bibi v. Bafati* ILR (1927) All. 773 that it includes, the actual as well as the constructive custody of the minor, and the section is not limited to the powers of enforcing the guardian's right to the extreme cases of an actual leaving or removal. In *Siddiq-un-nissa*

Bibi v.Nizam-uddin Khan ILR (1931) All. 128 it was further held that a ward in the actual custody of another person with the permission of the guardian is deemed to be in the constructive custody of the guardian, and that the refusal of the person in actual custody to hand over the minor to the guardian amounted to a removal of the minor from the constructive custody of the guardian within the meaning of Section 25 of the Act. It is nowhere alleged that the petitioner has abandoned the child or refused to keep him. In fact the petitioner alleges that he called upon his wife to come with the child and live with him, but it appears that owing to differences and unpleasantness in the family the respondent has refused to go and live with her child in the husband's house. There is, therefore, in law a removal of the child from the custody of the petitioner, and, in my opinion, the application is competent by way of petition u/s 25, and must be heard and decided on its merits.