
(1973) 07 AHC CK 0014
In the Allahabad High Court
Case No : F.A.F.O. No. 125 of 1973

Trine Holst Thomsen

APPELLANT

Vs

The Children's National Institute

RESPONDENT

Date of Decision : 31-07-1973

Acts Referred:

Guardians and Wards Act, 1890 — Section 7

Citation : AIR 1974 All 95 : (1973) 43 AWR 476

Hon'ble Judges : Hari Swarup, J

Bench : Single Bench

Advocate : Ravi S. Dhawan, for the Appellant; D.S. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Hari Swarup, J.—This appeal has been filed by Trine Hoist Thomsen against the order of the First Additional District Judge, Allahabad dismissing her application u/s 7 of the Guardians and Wards Act for being appointed guardian of the person of the minor girl. Km. Chaitali. The appellant is a resident of Denmark. She wished to take under her guardianship a minor Indian girl and for that purpose approached the respondent. The minor is reported to be an orphan living under the care and custody of the respondent the Children's National Institute, Swaraj Bhawan Allahabad. Learned counsel appearing for the Institute has stated that the minor is an orphan and the Institute has no knowledge about her parents relations or religion. The Institute, he has further stated, has no objection to the appellant being appointed as the minor's guardian.

2. The trial Court has dismissed the application on the ground that on the material available on the record, it was not established that it would be for the "well being of the minor" that the applicant be appointed her guardian. Learned counsel for the appellant contended that the affidavits had been filed in the trial Court and on the basis thereof, the Court below should have come to the conclusion that it would be for the welfare of the minor to appoint the appellant as the guardian. The affidavit has been sworn by the Notary Public in Denmark.

Section 14 of the Notaries Act, 1952, provides--

"14. Reciprocal arrangements for recognition of notarial acts done by foreign notaries--

If the Central Government is satisfied that by the law or practice of any country or place outside India, the notarial acts done by notaries within India are recognized for all or any limited purposes in that country or place, the Central Government may, by notification in the Official Gazette, declare that the notarial acts lawfully done by notaries within such country or place shall be recognised within India for all purposes or, as the case may be, for such limited purposes as may be specified in the notification."

Although time was granted, the necessary notification has not been produced and it has not been shown that the affidavit sworn in Denmark is admissible in guardianship proceedings in Courts in India. Only a telegram sent by the Ambassador of Denmark in India to the respondent opposite party in this case has been produced which states that "according to principles in Danish administration of justice there is reciprocity between India and Danish documents during a pending Court case in Denmark." The telegram however cannot be treated as evidence. But, even if all the facts stated in that affidavit are taken as established, no case has been made out for the appointment of the appellant as guardian.

3. The facts that have been asserted are: that the appellant is a well-to-do lady having considerable income, she lives in Denmark and is interested in rearing an Indian child, and that she is willing to be appointed the guardian of the minor's person. The purpose of the application seeking the guardianship of the minor is to take the child to Denmark. The appellant has no intention of coming to India or living in India. Learned counsel contends that it may not be possible for the child to get a passport for going to Denmark to join the appellant unless the appellant is appointed a guardian of the minor's person. It is clear that the purpose of the application is primarily to secure a licence for taking the child out of India. This is certainly not the purpose for which the Court can be moved to appoint guardian of a minor. It is not contemplated by the Guardians and Wards Act. According to Article 6 of the *Corpus Juris Secundum*. Vol. 39, page 6, "a guardian cannot be appointed for minors for the purposes of having them sent immediately into a foreign country:" (*Ala-Describes v. Wilmer* 69 Ala. 25 "nor will one be appointed for the sole purpose of transferring a minor's legal residence to a city so as to enable the minor to obtain gratuitous education at the city's expense." (N. Y.--*In re. Schnippcr's Guardianship* 268 N. Y. S. 302 It is thus evident that the Courts do not appoint guardians only to let the child secure a passport or for getting charitable education or help.

4. The purpose of appointment of a guardian by a Court under the Guardians and Wards Act is to protect the child and not to grant a licence for taking the child out of the country. As put by Bennett, J. in *Re. D. (INFANTS)* (1943) 2 All ER 411

"the jurisdiction is based upon the need of an infant for protection which in my judgment having regard to the authorities give this division of the Court jurisdiction to appoint a guardian." This view finds support from the speech of Lord Langdale in *Johnstone v. Beattie* (1843) 10 Cl & 145 where Lord Langdale observed: "Amidst the differences of opinion which exist in this case, it is satisfactory to me that no doubt is thrown upon the jurisdiction of the Court of Chancery to appoint guardians for any infant residing in England. The whole property of an infant may be situate in a foreign country, and tutors and curators of the person and estate of the infant may have been duly appointed according to the law of the country where the property is; and yet it may be evident that, without the authority of a guardian duly appointed here, and subject to the control of the Court of Chancery the infant may be without the protection which may be absolutely necessary for its welfare and even for its safety." Although it is the guardian who directly protects the minor the ultimate responsibility remains with the Court, when it appoints a guardian.

5. It cannot be disputed that the Court appointing guardian is vitally concerned with the protection of the child. How can a Court protect a child which does not remain within its jurisdiction? It is for this reason that Section 26 of the Guardians and Wards Act provides--

"26. (1) A guardian of the person appointed or declared by the Court...., shall not, without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed.

(2) The leave granted by the Court under Sub-section (1) may be special or general, and may be defined by the order granting it." The clear intention of the law is that the minor for whom the Court appoints a guardian should normally stay within the jurisdiction of the Court.

6. According to *American Jurisprudence*, Second Edn., Volume 39, page 48, Article 51, "a ward receives his status from a proceeding in rem in the probate Court and becomes the ward of the Court. The control of the ward's person and property remains in the probate Court with discharge of the duties in respect thereof being delegated to a guardian as the agent of the Court and subject to the orders of the Court." (Re: *Clendenning*, 145 Ohio St. 82). What is true for a guardian appointed by a Probate Court will also be true for a guardian appointed by an Indian Court under the Guardians and Wards Act. Even after appointing a guardian, the Court retains the jurisdiction for all purposes connected, therewith. It is for this reason of protecting him, whenever the need be. that the ward is required to remain within the jurisdiction of the Court which appoints a guardian for him. The purpose will be frustrated if the ward goes permanently out of Court's jurisdiction.

7. Section 39 of the Guardians and Wards Act also supports this view. It mentions various cases in which the guardian appointed or declared by the court

may be removed. One of the conditions is given in Clause (h) which provides --
"for ceasing to reside within the local limits of the jurisdiction of the Court."

This shows the intention of the Legislature that a guardian should also normally reside within the local limits of the jurisdiction of the Court. This is essential because without it the Court will be powerless to exercise control over him and thereby protect the interests of the minor. A Division Bench of this Court in the case of *Asghar Ali Vs. Amina Begam and Others*, expressed the view that the guardian to be appointed should reside within the jurisdiction of the Court to which he makes the application. It was observed. "We might also refer to Clause (h) of Section 39 of the same Act, which shows that the Legislature contemplates that an applicant for guardianship should reside within the jurisdiction of the Court to which he makes the application." This view was however in a later case considered as expressed obiter dicta by one of the learned Judges who decided the case of *Beni Prasad Vs. Mt. Parwati*. The Bench in that case was of the opinion that. There was nothing in law to prevent a person, not residing within the jurisdiction of the District Judge within whose jurisdiction the minor ordinarily resided and had property, from being appointed guardian of his person and property. It was taken that Clause (h) of Section 39 of the Act was only a ground for removal and not a bar to appointment. It may be that the law does not prohibit a Court from entertaining an application for appointment as guardian, of a person not re-siding within the jurisdiction of the Court, but it will not be a sound policy to appoint such a person as guardian over whom the Court may have no control.

8. Admittedly, the appellant resides in Denmark and, as seen earlier has no intention of coming to India to reside within the jurisdiction of the District Court. Although a formal application has not yet been made for permission to remove the child out of Court's jurisdiction, but it is bound to be made immediately after the appellant is appointed the guardian; and, if permission to take the child out of the jurisdiction of the District Judge will not be granted, the appointment of the guardian will be of no avail as then the appellant will not be able either to watch the minor's interest or look to her welfare. As the appointment cannot be made for the purpose of letting the child leave the country and consequently the Court's jurisdiction, there can be no justification to appoint the appellant guardian of the minor.

9. Learned counsel for the appellant urged that the refusal to appoint the appellant guardian of the minor may have the consequence of preventing the minor from going out of India and having a life of greater comfort. The contention has no merit. Dismissal of an application u/s 7 of the Act cannot amount to any preventive order. It does not prohibit the minor from going out of the country. If the Government of India grants the passport and the Government of Denmark grants the Visa the child can go. The Court's order dismissing the application cannot come in the way.

10. The appeal accordingly fails and is dismissed. As no one has opposed this appeal, there will be no order as to costs.