Privy Council Appeal No. 23 of 1914.

Mrs. Annie Besant - - - *Appellant,*

v.

G. Narayaniah and J. Krishnamurti and J. Nityananda added by Order in Council *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH MAY 1914.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD MOULTON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD PARKER OF WADDINGTON.]

This is an appeal from an order made by the High Court of Madras in its appellate jurisdiction on the 29th October 1913 confirming with a variation as to costs a decree of Mr. Justice Bakewell in a suit in which G. Narayaniah (the present respondent) was plaintiff, and Annie Besant (the present appellant) was defendant. The decree declared that J. Krishnamurti and J. Nityananda, the sons of the plaintiff, were wards of Court and that the plaintiff was guardian of their persons, and ordered the defendant to hand over the custody of the wards to the plaintiff as such guardian.

The facts which gave rise to the action were as follows:—The plaintiff is a Hindu residing at Madras. He is a Brahmin, but is not well off, having an income of some 160*l.* per annum only.

[48] J. 340. 160.—5/1914. E. & S.

He was for many years a member of a society called the Theosophical Society, of which the defendant was president and was well acquainted with her. He had two sons, J. Krishnamurti and J. Nityananda, born respectively on the 11th May 1895 and 30th May 1898. Early in 1910 the defendant offered to take charge of these sons and defray the expense of their maintenance and education in England and at the University of Oxford. The plaintiff thought it desirable to take advantage of the opportunity thus afforded of giving his sons a western education, notwithstanding it would entail a loss of caste. He accordingly accepted the defendant's offer, and by a letter to the defendant, dated the 6th March 1910, affected to appoint the defendant to be guardian of their persons and authorised her to act as such from that time forward.

In their Lordships' opinion the principle on which the legal effect of such a letter falls to be determined do not admit of dispute.

There is no difference in this respect between English and Hindu law. As in this country so among the Hindus, the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot therefore during his lifetime substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If, however, the authority has been acted upon in such a way as, in the opinion of the Court exercising the jurisdiction of the Crown over infants, to create associations or give rise to expectations on the

part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation. (*Lyons* v. *Blenkin*, Jac. 245.)

Shortly after the respondent accepted her offer the appellant took charge of the boys and they have since been in her custody and she has defrayed the expense of their maintenance and education. In February 1912 they left India in her company, and after staying with her for some time in Sicily and Italy finally accompanied her to England, where she left them under the charge of Mrs. Jacob Bright, having made arrangements for their having a course of tuition such as would enable them to enter the University of Oxford.

Though the respondent's confidence in the appellant appears to have been shaken sometime previously for reasons to which it is unnecessary to refer, he assented to, or at any rate acquiesced in, the departure of his sons in her company for Europe. Nevertheless on the 11th July 1912 he wrote the appellant a letter cancelling his previous letter of the 6th March 1910, demanding that his sons should be restored to his custody and threatening proceedings if such demand were not complied with. The appellant who had returned to India refused to comply with such demand, and the respondent thereupon commenced a suit in the District Court of Chingleput, in the Madras Presidency, asking to have it declared, that he was entitled to the guardianship and custody of his sons, and that the appellant was not entitled to, or in any case was unfit to be in charge and guardianship of such sons, and for an order on the appellant to hand over such sons to the respondent or such other person as to the Court might seem meet.

In their Lordships' opinion this suit was

entirely misconceived. It was not, and indeed could not be disputed that the plaintiff remained the guardian of his children notwithstanding that he had affected to substitute the defendant as guardian in his place. The real question was whether he was still entitled to exercise the functions of guardian and resume the custody of his sons and alter the scheme which had been formulated for their education. Again, it was not and could not be disputed that the letter of the 6th of March 1910 was in the nature of a revocable authority. The real question was whether in the events which had happened the plaintiff was at liberty to revoke it. Both questions fell to be determined having regard to the interests and welfare of the infants, bearing in mind, of course, their parentage and religion, and could only be decided by a Court exercising the jurisdiction of the Crown over infants, and in their presence. The District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890. By the 9th section of that Act the jurisdiction of the Court is confined to infants ordinarily resident in the district. It is in their Lordships' opinion impossible to hold that infants who had months previously left India with a view to being educated in England and going to the University of Oxford were ordinarily resident in the district of Chingleput. Further a suit *inter partes* is not the form of procedure prescribed by the Act for proceedings in a District Court touching the guardianship of infants. It is true that the suit was subsequently transferred to the High Court under Clause 13 of the Letters Patent 1865, but the powers of the High Court in dealing with suits so transferred would seem to be confined to powers which but for the transfer might have been exercised by the District Court.

Again, the relief asked for was a mandatory order directing the defendant to take possession of the persons of the infants in England, bring them to India, and hand them over to their father. Considering the age of the infants any attempt on the part of the defendant to comply with this order, would, if the infants had refused to return to India, have been contrary to the law of this country, and would have at once exposed the defendant to proceedings in this country on writ of *habeas corpus*. No court ought to make an order which might lead to these consequences. The most which a court of competent jurisdiction in India could do under circumstances such as existed in the present case, was to order the defendant to concur with the plaintiff as the infants' guardian in taking proceedings in this country to regain the custody and control of his sons.

The difficulties and anomalies of the procedure adopted by the plaintiff are well illustrated by the history of the proceedings. After the transfer to the High Court, issues were settled in the ordinary manner. There was no issue as to whether it was or was not desirable in the interests of the infants, that they should give up all idea of a western university education, and return to India. It was urged that the High Court did in fact consider their interests. If it did so, it must have been upon evidence admitted as relevant on other issues, and it is by no means apparent that, had a proper issue on the point been directed, further evidence would not have been available. At any rate on such an issue, the necessity of the infants being properly represented before the Court, and of ascertaining what they themselves desired, could hardly have been overlooked.

At the trial of the action some difficulty appears to have been felt by reason of the facts (1) that the suit was not such as to make the infants wards of Court, and (2) that the elder infant would within a very short time attain his majority according to Hindu law. The Trial Judge sought to overcome those difficulties (1) by declaring the infants wards of Court, and (2) by taking advantage of Section 3 of the Indian Majority Act, 1875, as amended by Section 52 of the Guardians and Wards Act, 1890, and declaring under Section 7 of the latter Act that the plaintiff was their guardian so as to prolong their minorities until they attained respectively the age of 21 years. It was hardly contended that any such order was competent to the District Court in the suit in question. It is alleged, however, that when once the suit had been transferred to the High Court, the High Court had a general jurisdiction over infants which they could exercise at pleasure, and that the directions in question were properly given by virtue of such general jurisdiction. It is to be observed, however, that whatever may have been the jurisdiction of the High Court to declare the infants to be Wards of Court, an order declaring a guardian could only be made if their interests required it, and, as appears above, they were not before the Court, nor were their interests adequately considered. 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.

Since the appeal has been presented the infants have obtained the leave of the Board to intervene therein and be heard by counsel. Counsel on their behalf have appeared before

their Lordships' Board and stated that the infants do not desire to return to India or abandon their chance of obtaining an university education in this country. The order of the High Court directing the defendant to take them back to India cannot be lawfully carried out without their consent or without an order from the Court exercising the jurisdiction of the Crown over infants in this country. It is and always was open to the respondent to apply to His Majesty's High Court of Justice in England for that purpose. If he does so the interests of the infants will be considered, and care will be taken to ascertain their own wishes on all material points. Their Lordships do not consider it desirable to express any opinion of their own on questions with which only the High Court in England can deal satisfactorily. It is enough to say that the order made by the Trial Judge in India as varied by the High Court in its appellate jurisdiction cannot stand, and their Lordships will humbly advise His Majesty that the same ought to be discharged, and the suit dismissed with costs both here and in the Courts below, but without prejudice to any application the respondent may think fit to make to the High Court in England touching the guardianship, custody, and maintenance of his children.

In the Privy Council.

Mrs. **ANNIE BESANT**

v.

G. NARAYANIAH AND J. KRISHNAMURTI AND J. NITYANANDA added by Order in Council.

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