

[Lahore]

Before M. Mehboob Ahmad, J

IQBAL BIBI-Appellant versus

MUBARAK ALI-Respondent

First Appeal from Original order No. 216 of 1977, decided on 4th April 1979.

(a) Civil Procedure Code (V of 1908)--

O. V, r. 20-Substituted service-Variou notices issued to appellant not successfully served in ordinary mode-Substituted service effected through publication-Appellant not taking any exception to mode of service-Service on appellant, held, duly effected-Substituted service when duly effected, held further, as touch a service as direct.--(Sub stituted service).

(b) Guardians and Wards Act (VIII of 1890)-

S. 25-Custody of minor-Appellant (mother) not succeeding in getting divorce, hence living with stranger-Minor neither being imparted education nor given proper nourishment and treated as servant-Court below, in circumstances, held, rightly held custody of minor to be given to father.--[Custody of minor].

Shamim Abbas Bokhari for Appellant. .

Khan Khuda Dad Khan Burki for Respondent.'

Date of hearing : 4th April 1979.

JUDGMENT

This appeal is directed against the order dated 14-4-1977 passed by the learned Judge Family Court/Guardian Judge, Vehari.

2. Briefly stated, the facts of the case are that the respondent filed an application under section 25 of the Guardians and Wards Act for the custody of his minor daughter, Mst. Shamshad Begum, born out of his wedlock with the appellant. It was alleged in the application that the appellant was living away from the respon dent without any just cause despite the dismissal of her suit for dis solution of marriage and failure of the appeal preferred against the order of dismissal of the aforesaid suit for dissolution of marriage, and that she was keeping the minor daughter of the appellant with her in the house of a stranger, Allah Ditta, where the minor was neither being imparted any education nor was she getting good nourishment and was being treated as a servant.

3. Ex parte proceedings were taken against the appellant in the said application and ultimately the application was allowed vide the impugned order. It was held that it was in the welfare of the minor to be given in the custody of the respondent.

4. Since the respondent could get custody of the minor he applied for issue of a warrant for recovering the minor and handing her over to the respondent. The girl was produced by the Bailiff before the learned Guardian Judge and she was handed over to the custody of the respondent by order dated 9-10-1977.

5. Thereafter the appellant filed the present appeal in this Court on 15-10-1977 against the order of the Judge Family Court/Guardian Judge, Vehari dated 14-4-1977 along with an application under section 5 of the Limitation Act for condoning the delay in filing the appeal.

6. The first hurdle in the way of the appellant being the filing of the appeal beyond the period of limitation, the learned counsel for the appellant to meet this situation contended that the appellant came to know of the impugned order only when the warrant for production of the girl was received by her on 9-10-1977 and as such the appeal could not be filed within time.

7: He further contended that the impugned order is liable to be set aside since it had been passed without notice to the appellant.

8. He also contended that the girl being still of 9 or 10 years of age it is the mother who is entitled to her custody.

9. On the other hand, -the learned counsel for the respondent argued that due notices had been issued for the appellant by the learned Judge Family Court/Guardian Judge, Vehari and that since she was keeping herself out of the way her substituted service was ordered and duly effected by publication of a notice in the daily "WAFAQ", Lahore dated 13-2-1977 for appearance on 17-3-1977. He submitted that she having failed to appear, the learned Court below was justified in proceeding Ex pane against her and in passing the impugned order.

10. He further urged that no ground for condoning the inordinate delay of over five months in filing the appeal has been made out whereas it is the duty of an appellant filing the appeal out of time to account for each day of delay.

11. As to the merits of the case, he contended that the order of the learned Guardian Judge, in the circumstances of the case does not call for any interference especially in view of the evidence on the record that the appellant is living with a stranger and thus had lost her right to keep the minor daughter of the respondent with her and also because it is in the welfare of the minor to be given in the custody of the father.

12. Admittedly the appeal has been filed beyond the period of limitation. The application filed under section 5 of the Limitation Act does not give any sufficient reason for condonation of delay. Only a vague statement has been made that the appellant learnt of the impugned order when the warrant for production of the minor girl was received. It has been rightly argued by the learned counsel for the respondent that such an inordinate delay cannot be brushed aside lightly.

13. On merits as well, the, appellant does not have a case. The main ground urged was that the impugned order had been passed without notice to the appellant. Examination of the file shows that various notices were issued to the appellant by the learned Court below but as she could not be served in the ordinary mode, substituted service was directed to effected on her and notice was duly published in the daily "WAFaq",4 Lahore. No exception having been taken to the mode of service by the appellant, service on the appellant shall be deemed to have been duly effected. Substituted service when duly effected is as much a service a direct. This plea therefore fails.

14. The other contention raised on behalf of the appellant that minor being a girl should be given in the custody of the mother, is also without force in that the evidence brought on record shows that the appellant was living with a stranger and the minor was neither being imparted 19 education nor was she being given proper nourishment and was also being treated as a servant. In such circumstances it was rightly held by the Court below that the minor should be given in the custody of the father. The findings of the Courts below in this regard appear to b unexceptionable.

15. In view of the foregoing, this. appeal has no merit and is accordingly dismissed. There will, however, be no order as to costs.

Appeal dismissed.