

Equivalent citations: (2004) 3 GLR 405

Bench: P Agarwal

Farjana Banu vs Parvez Alam on 23/4/2004

## JUDGMENT

P.G. Agarwal, J.

1. Heard Mr. A.K. Goswami, learned counsel for the petitioner and Mr. A. Roy, learned counsel for the respondent/caveator.

2. The caveat stands discharged.

3. The petitioner had married the respondent sometime in the year 1994 and out of the said wed lock, three children were born. Subsequently, some marital disputes arose between, the parties and they started living separately. The respondent/husband thereafter filed an application under the Guardians and Wards Act, 1890 (for short the 'Act') for custody of the minor daughters and it was registered as Misc. (G) No. 53/2003. On notice being issued, the petitioner appeared before the District Judge, Tinsukia and prayed for time to file the written statement and subsequently the prayer for allowing time to file written statement was rejected under Order VIII, Rule 1, CPC. The petitioner had filed the written statement and thereafter she filed an application under Section 151 CPC for accepting the written statement. The learned District Judge, Tinsukia, thereafter, vide order, dated 20.3.2004 which is impugned in this writ petition, rejected the prayer for accepting the written statement.

4. The learned counsel for the petitioner has submitted that the learned District Judge has rejected the prayer on two counts, which are contrary to each other. It has been held in the impugned order that under the Act there is no provision for filing of any written statement. However, the learned District Judge at the same time has refused to accept the written statement in view of the provisions of Order VIII, Rule 1, CPC.

5. On perusal of the Act, we find that it does not contain any definite procedure for deciding the application for guardianship. Section 11 provides for the procedure and admission of application whereby notices are required to be served in the manner provided under the CPC. Section 12 provides for interim orders and Section 13 of the Act reads as follows :-

"13. Hearing of the evidence before making of order. - On the day fixed for the hearing of the application or as soon as afterwards as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application."

6. Although no definite procedure has been provided under the Act, the submission was made that in view of the provisions of Section 141 of the Civil Procedure Code, the provisions of the said Code should be followed as far as may be practicable. The earlier view of the various High Courts was that the procedure is not entirely to be a summary proceeding and the court is required to investigate into the truth or otherwise of the allegations. However, the procedure for disposal of an application filed under Section 10 need not be that elaborate as provided under the Code. The above view is discernible from the observations of the Apex Court in the case of Laxmi Kant Pandey v. Union of India, AIR 1986 SC 272. The Apex Court observed as follows :-

"We do not know whether this is true, but if it is, we must express our strong disapproval of such delay in disposal of the proceedings for appointment of guardian. We wish to impress upon the district courts that proceedings for appointment of guardian of the child with a view to its eventual adoption, must be disposed of

at the earliest and in any event not later than two months from the date of filing of the application. We would request the High Court to call for returns from the district courts within their respective jurisdiction showing every two months as to how many applications for appointment of guardian are pending, when they are filed and if more than two months have passed since the date of filing, when they have not been disposed of up to the date of the return. If any application for guardianship is not disposed of by the district courts within a period of two months and there is no satisfactory explanation, the High Courts must take a serious view of the matter."

7. In *Laxmi Kant Pandey* (supra) the matter relates to appointment of guardian for the purpose of adoption, whereas this is a case of appointment of guardian between the two parents. However, the paramount consideration in both the cases is the welfare of the child and prolonging the litigation in such matters cannot be considered to be appropriate or good for the child involved.

8. We are, therefore, of the view that the detailed procedure of trial laid down under the Code of Civil Procedure is not applicable in the matter of disposal of applications under the Act and the matter is required to be disposed of expeditiously. The said Act nowhere provides for filing of any written statement by the defendant or the person to whom the notice is issued. The matter can be examined from another angle also. The absence of written statement or pleadings is also not material as because the court is required to investigate the truth and consider the welfare of the children before disposing of the application or granting guardianship under the Act in cases where no objections have been filed.

9. In view of the above, we hold that the non-acceptance of the written statement filed by the petitioner Was on that count only and it cannot be considered to be in violation of the provisions of Order VIII, Rule 1, CPC.

10. Mr. A.K. Goswami, learned counsel for the petitioner was apprehensive of the fact that when the prayer of the petitioner for acceptance of the written statement has been denied, the petitioner may not be allowed to cross-examine the witnesses of the respondent/ applicant or adduce evidence in her support. We find absolutely no basis for such apprehensions. In view of the provisions of Section 13 as quoted above, the court is required to hear the evidence as may be adduced in support of or in opposition of the application. The petitioner before us shall have the liberty to cross-examine the witnesses of the respondent/applicant and also adduce evidence in opposition of the application.

11. With the above observations, this writ petition stands disposed of. The District Judge, Tinsukia shall proceed in the matter and decide the matter expeditiously.