

JAYAWARDANE
v
RANAWEERA

COURT OF APPEAL.
AMARATUNGA, J.
WIMALACHANDRA, J.
CALA 1/2003. (LG)
DC COLOMBO 21109/D.
MAY 31, 2004.

Civil Procedure Code – section 621 and section 839 – Action for divorce – Custody of child – Judicature Act, of 1978. – Sections 24 (1) and (2), 24 (3).

Child alleged to be in illegal custody – Could an application under section 621 be made or is it under section 24 (5) of the Judicature Act? – If not is it a fatal irregularity?

The petitioner-respondent husband instituted action seeking a divorce against the defendant-appellant wife. The defendant-appellant wife had also filed a divorce action, which was laid by until the disposal of the action filed by the plaintiff-respondent husband. There was an amicable arrangement made by the parties for the plaintiff-respondent to have access to the child.

The defendant-appellant (wife) complained to court that the plaintiff-respondent (husband) had removed the child from school and was keeping the child wrongfully and illegally in his custody. The defendant-appellant wife sought an order granting legal and physical custody of the child until the conclusion of the divorce case. The application was made under section 621 and S.839. The plaintiff-respondent husband objected to the application

stating that since the allegation was that the plaintiff-respondent husband was keeping the child in illegal custody she could not come under Section 621/839 but she ought to have come under section 23 (4) of the Judicature Act. The trial Judge upheld the objection.

On leave being sought,

Held:

Per Gamini Amaratunga, J.,

"If a person making an application to a Court, refers to a wrong section as the provisions of law under which such application is made such reference to the wrong provisions of law in itself will not deprive a Court of its jurisdiction if otherwise has".

- (1) The powers conferred by section 621 are wider than the jurisdiction conferred by section 24 (3), Judicature Act; section 621 does not restrict the power of the District Court to any specific situation. It is a wider general power.
- (2) Even though the defendant-petitioner has alleged that the plaintiff-respondent was keeping the child in wrongful and illegal custody, the Court should have realized that a father's custody of his child is not illegal unless such custody is in violation of an order of Court.
- (3) There is no reference to a wrong section. Under section 621 Court had power or jurisdiction to deal with the petitioner's application.

APPLICATION for leave to appeal from an order of the District Court of Colombo. with leave being granted.

Case referred to:

Kumaratunga v Samarasinghe – Vol 2 Fundamental Rights page 347 at 372.

Ikram Mohamed PC with *M.S.A. Wadood* for petitioner.

Kuvera de Zoysa for respondent.

Cur. adv. vult.

September 22nd, 2004.

GAMINI AMARATUNGA, J.

This is an application for leave to appeal against an order made 01 by the learned Additional District Judge of Colombo in respect of an application made by the defendant-appellant mother, in the course of an action for divorce, to get an order from court granting the legal and physical custody of the child of the marriage to her. Shortly, the relevant facts are as follows.

The plaintiff-respondent instituted action No. 21109-D seeking a decree for divorce against the defendant wife on the ground of malicious desertion. He also sought an order granting custody of the child to him. The defendant wife also filed action No. 21104/D praying for a decree for divorce on the ground of the husband's constructive malicious desertion. She also claimed an order granting custody of the child to her. The case filed by the wife was laid by until the hearing and disposal of the action filed by the plaintiff husband.

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The child of the marriage, a son, was born in 1997. He was in the physical custody of the defendant. There was an amicable arrangement made by the parties for the plaintiff husband to have access to the child. On each Saturday at 5.00 p.m. the child was handed over to the plaintiff husband for him to keep the child with him till 8.00 a.m. of next Monday.

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By a petition dated 1.10.2002, filed in action No. 21109-D, the defendant alleged that on 10.9.2002, the plaintiff had removed the child from the montessori school and was keeping the child wrongfully and illegally in his custody. By her petition she sought an order granting the legal and physical custody of the child to her until the conclusion of the divorce case. The caption to her application filed in court says that it is an application in terms of section 621 and 839 of the Civil Procedure Code. The plaintiff husband raised a preliminary objection to this application on the basis that since the allegation was that the plaintiff husband was keeping the child in illegal custody she could not come under section 621 and 839 of the Civil Procedure Code and that she should have made her application under Chapter 5 of the Judicature Act No. 2 of 1978. The learned Judge upheld this objection and dismissed the application of the defendant-petitioner. This court granted leave to appeal against that order.

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Section 621 (the relevant part) is as follows. "In any action for obtaining a dissolution of marriage or a decree of nullity of marriage, the court may from time to time ... make such interim orders... as the court deems proper with respect to the custody... of the minor children." The words, "the court may from time to time make such interim orders as the court deems proper with respect to the custody of minor children" confers on the District Court very

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wide powers to make interim orders relating to the custody of the child.

Section 24(3) of the Judicature Act, which sets out the jurisdiction of Family Court is as follows:

“An application for the custody of a minor child or of the spouse of any marriage alleged to be kept in wrongful or illegal custody by any parent or by the other spouse or guardian or relative of such minor child or spouse shall be heard or determined by the Family Court; and such court shall have full power and jurisdiction to hear and determine the same and make such orders both interim and final as the justice of the case shall require.” 50

This section caters to a specific situation, that is, where a minor is being kept in wrongful or illegal custody by a parent or any other person. Section 24(1) confers a general power upon the Family Court jurisdiction in respect of custody of minor children. Jurisdiction conferred upon Family Court is presently exercised by District Courts. The powers conferred by section 621 are wider than the jurisdiction conferred by section 24(3) of the Judicature Act. Section 621 does not restrict the power of the District Court to any specific situation. It is a wide general power. 60

The allegation that the plaintiff was keeping the child in wrongful or illegal custody cannot take away the District Court's wide powers under section 621. Even though the defendant-petitioner has alleged that the plaintiff-respondent was keeping the child in wrongful or illegal custody, the court should have realized that a father's custody of his child is not illegal unless such custody is in violation of an order of a court. What the defendant-petitioner in fact alleges was that the child who was in her physical custody at the time the divorce action was filed, was taken away by the father without her consent or without an order of a court. What she complained of was the plaintiff's action in taking physical custody on his own, without any order of court when the question of the child's custody was a matter pending before Court for a decision. In such a situation the District Court was certainly entitled to inquire into the complaint of the petitioner and make an order under section 621 of the Civil Procedure Code. 70 80

If a person making an application to a court, refers to a wrong section of a statute in the caption as the provision of law under which such application is made, such reference to the wrong provision of law in itself will not deprive a court of its jurisdiction it otherwise has. If the Court has jurisdiction under another provision of law to deal with the substantive matter raised in the application, the court has jurisdiction to deal with such matter notwithstanding the reference to a wrong section in the caption. Vide *Kumaratunga v Samarasinghe* ⁽¹⁾

In this instance there was no reference to a wrong section. Under section 621 the court had power or jurisdiction to deal with the application of the petitioner. Accordingly I set aside the order of the learned Judge dated 16.12.2002 dismissing the petitioner's application. I direct the learned Judge to hold an inquiry into the defendant petitioner's application dated 01.10.2002 and make an appropriate order. The defendant-petitioner is entitled to Rs. 7500/- as costs of this application. 90

WIMALACHANDRA, J. – I agree.

Application allowed.

District Judge is ordered to hold an inquiry.