

(1917) 02 MAD CK 0035
In the Madras High Court

Chidambara Pillai and Others

APPELLANT

Vs

Rangasami Naicker and Thirty-Seven Ors.

RESPONDENT

Date of Decision : 20-02-1917

Acts Referred:

Citation : (1918) ILR (Mad) 561 : (1918) 7 LW 454

Hon'ble Judges : Seshagiri Ayyar, J; Coutts Trotter, J; Ayling, J

Bench : Full Bench

Judgement

Ayling, J.—I have had the advantage of perusing the judgment which my learned brother, Seshagiri Ayyar, J., is about to pronounce; and I agree in the conclusion arrived at by him. It is impossible to contend that the power of appointing a testamentary guardian is supported by anything in the ancient texts; and the attractive doctrine that anything which is not expressly forbidden should be held lawful, if expedient, seems to me one, which has its dangers, and requires careful consideration before application. In the present case, the power claimed seems to run counter to the conception of a Hindu joint family in which every member obtains an interest at birth. I can only agree with Sadasiva Ayyar, J.'s remark in *Chidambaram Pillai v. Veerappa Chettiar* (1917) 6 L.W. 640 in which that learned Judge says:

On principle I find it difficult to hold that a man who cannot deal with a particular species of property by will can make arrangements for the management of that property by will after his death or can appoint guardians to manage that property for minor owners who obtain it by survivorship after his death.

2. This seems to me to sum up the whole matter.

3. I am not even clear that considerations of general expediency support respondents' contention. The reference covers the case not only of the adult coparcener's own minor sons, but of his minor nephews, and even minor brother regarding whom the natural right of a father discussed by Kumaraswami Sastri, J., in his order of reference can have no application. Even as regards sons, I

think the interests of the minors are sufficiently protected by the power of the Court to appoint a guardian; and while the expressed wishes of the father are sure to receive attention at the Court's hands, nothing further is required.

4. I would answer the question in the negative.

Coutts Trotter, J.

5. I also have had the advantage of perusing my learned brother Seshagiri Ayyar's judgment. I only abstain from simply expressing my own concurrence in it, because my doing so might seem to be associating myself with a familiarity with the ancient authorities which I cannot pretend to possess. I therefore put what I have to say in my own words.

6. To speak of natural rights has always been recognized as a slippery path for the political thinker to tread from the days of Hobbes and Rousseau. It is an even greater pitfall to a lawyer. To appoint a guardian to the person of his infant children may be a "natural" right vested in the father. To clothe him with authority over property which belongs to so complex an institution as a Hindu joint family may seem to me to be something which cannot be derived from nature, but must be founded on some legal warrant. In England the warrant is statutory, and it is not pretended that there is any statutory authority in force in India. The citations from Manu seem to show that the original conception was that the custody of properties of the joint family where there was no adult member should be the care of the king, which in modern language means the Courts of the country. No case has been cited which can be said to recognize the suggested right. *Soobah Doorgah Lal Jha v. Rajah Neelanund Singh* (1867) 7 W.R. 74 contains expressions which tend to show that the learned Judges supposed that such a power would be possible; but they do not definitely so decide. Mr. K. Srinivasa Ayyangar supported that judgment on the ground that as the properties dealt with were the properties of the father absolutely and were not joint properties, his right to appoint a guardian for them might be considered as an inherent part of his total right of ownership. That again seems to me to be lapsing into abstract speculation, and it may be that Mr. T.R. Ramachandra Ayyar's attack on this theory--which not insignificantly formed almost the whole of his argument--was well-founded. Beyond that his argument seemed to me to come merely to this. The thing is convenient, it is consonant with all right notions of what a father ought to be able to do for his children; it is nowhere expressly prohibited; therefore it can be done. To me on the contrary it seems that to put a person in a definite legal relation to property of which he is not the owner is a step which cannot be taken unless there is legal authority for taking it. Its convenience and justice may be admirable reasons for the legislature to take action. They cannot in my opinion suffice to set in motion a court of law.

Seshagiri Ayyar, J.

7. The question referred for our consideration is whether it is competent to the only adult coparcener of a Mitakshara family consisting of himself and his minor

coparceners to appoint a testamentary guardian to the coparcenary properties of the minor coparceners.

8. It was argued before us that the real point for decision is whether the manager of a Hindu family, be he the father, the uncle or an elder brother, can appoint a testamentary guardian for the property of his minor coparceners. In the Hindu Law there is no provision for the appointment of a testamentary guardian. That may be due to the fact that the idea of making a will is of recent origin. The only texts of Hindu Law which relate to this subject are all collected in Colebrooke's Digest, vol. II, pages 574 to 577. These authorities cast upon the king the duty of protecting the property of a minor.

9. Mr. T.R. Ramachandra Ayyar for the respondents drew our attention to the commentary of Kullookha Bhatta on Manu's text and argued that the protection of the king should be invoked only where the infant was otherwise unprotected. I do not understand the commentator to indicate by the use of the expression "anadha" that the deceased father or manager is competent to appoint a guardian and that it is only in default of such an appointment the king can step in. On the other hand it is clear from Manu's verses that the primary right of guardianship is in the king, and it is only by reflection that the father during his lifetime exercises that right (as if by delegation by the sovereign).

10. On principle, it appears to me that a person who is not capable of making a gift of his property or to dispose of it by testament cannot be in a position to control that property after his death. However convenient it may be and however consonant with natural justice, that a father or manager should indicate his preference of an individual as guardian by a testament, in my opinion it would be inconsistent with the theory of survivorship that he should have the power to dictate to the king or to the Judges appointed by him as to who should be the guardian of his minor coparceners. In the majority of cases the wishes of the father or manager would be acted upon by the Courts. But to say that his directions should be regarded as amounting to a legal appointment is opposed to the principle underlying the Mitakshara system of law.

11. In the order of reference Mr. Justice Kumaraswami Sastriyar refers to the natural right of a father to appoint a guardian and says that such a power is conferred by every civilised system of jurisprudence. Mr. K. Srinivasa Ayyangar in a very learned argument has drawn our attention to the theories of guardianship enunciated in the ancient and modern systems of jurisprudence. An examination of the citations shows that whereas the right of appointing a guardian for the person of an infant has been in some systems regarded as the natural or the nurtural right of the parent, in none of them has it been stated that the right to appoint a guardian of property is a common law right. In Roman Law just as in the Hindu Law, the protection of property was enjoined upon the State. In English Law the power to appoint a testamentary guardian was first given by 12 Carl. II, cap. 24 (see Simpson on Infants, page 105). It is stated in the text-book that the right of appointing a testamentary guardian is not a common law right.

In America where the Civil Law of Rome and the English Law have been further developed, it is clear that the right of appointing a testamentary guardian is not regarded as an inherent right in the parent (see 21 American Cyclopaedia page, 12). Therefore I am unable to accept the statement of the learned Judge that in other systems of jurisprudence the right of appointing a testamentary guardian exists as a common law right in the parent.

12. I shall now discuss the cases. The earliest decision upon the subject barring the decision of Sudder Adawlat of the High Court of the North West Provinces is *Soobah Doorgah Lal Jha v. Rajah Neelanund Singh* (1867) 7 W.R. 74. There are undoubtedly observations in that judgment which show that the learned Judge believed that he had the authority of the Hindu Law in holding that a testamentary guardian can be appointed for Mitakshara minor. The actual decision itself is supportable upon other grounds. There were two classes of property in respect of which a person preparing to act on behalf of the minor had entered into a compromise on behalf of the minor. This person was appointed guardian by the father in his will; he was also recognized by the Civil Court as the guardian ad litem of the minor. The compromise in the suit related to ancestral property. It was upheld. It is well settled that where a guardian is appointed by the Court and an honest compromise is come to in the presence of the Court it is prima facie binding upon the minor unless the latter can show that his guardian was guilty of fraud or other invalidating circumstances. There was another species of property in regard to which the guardian appointed by the will had entered into a compromise outside the Court. That property was the self-acquisition of the father. In respect of such property, it can hardly be disputed that it is open to the testator to appoint a guardian to manage it. Therefore the conclusion come to in the case is right. The observations of the learned Judge that Hindu Law sanctions the appointment of a guardian receive no support from any citation made by him or from any authority to which we have been referred to in the course of the argument in this case. I am therefore not prepared to follow the obiter dicta contained in that judgment.

13. The next case very strongly relied upon by Mr. T.R. Ramachandra Ayyar is the decision of the Judicial Committee in *Raj Lukhee Dabea v. Gokool Chunder Chowdhry* (1869) 13 M.I.A., 209. It was a case under the Dayabhaga law under which it was competent to a father to dispose of property notwithstanding the existence of sons. The suit was brought to set aside the alienation made by the widows of one Guruprasad Sarma. The latter had executed a document in favour of the widows under which the alienees claimed that the widows had ample power of disposition. The Judicial Committee came to the conclusion that the document conferred no rights of property on the widows. They regarded it as providing only "a species of trust for management and that it did not interfere with the devolution of the estate according to the ordinary law of succession under the Hindu Law." Following this view, their Lordships of the Judicial Committee considered whether the disposition by the widows as managers of the property of Guruprasad's sons was impeachable. It is clear from the facts that

the question before the Committee did not relate to coparcenary property or to the power of a Mitakshara father to appoint a testamentary guardian. Notwithstanding the argument of the learned vakil for the respondents, I am unable to see why a person who is competent to devise his property whether to his own children or to strangers should not deal in his testament only with the right of management of that property. It is not necessary to validate such an appointment of a guardian or manager that the testament should make a gift of the property as well. The right over property involves two definite rights--the right of management and the right of enjoyment. A person may devise the right of management only by providing that his legal heirs shall have the benefit and advice of a person in whom the testator had confidence. That was really what happened in the Bengal case. Sir James Colville in delivering the judgment points out that the right of succession under the Hindu Law was not interfered with by the testator. I see nothing in the judgment of the Board in that case to warrant the contention that a person who cannot deal with a species of property by a testamentary document can devise the right of management over such property. *Mahableshvar Krishnappa v. Ramachandra Mangesh* ILR (1914) 38 Bom. 94 was the next case referred to. I cannot help saying that the learned Judges have not correctly understood *Raj Lukhee Dabea v. Gokool Chunder Chowdhry* (1869) 13 M.I.A. 209, on which they base their conclusion; I feel constrained to differ from that decision. These are all the cases in the other High Courts. So far as Madras is concerned the preponderance of authority is in favour of holding that a Mitakshara father has no power to appoint a testamentary guardian to his sons' property, a fortiori a Mitakshara manager has no power to appoint such a guardian. The first decision is *Kanakasabai Mudaliar v. Ponnuswami Mudaliar* (1913) 21 I.C 848 to which Mr. Justice Spencer was a party. *Krishna Aiyar v. Chakrapani* (1915) 29 I.C. 475 is to the same effect. In *Alagappa Ayyangar v. Mangathai Ammangar* ILR (1917) Mad. 672 Mr. Justice Sadasiva Ayyar and Mr. Justice Moore came to the same conclusion. In *Chidambaram Pillai v. Vesrapa Chettiar* (1917) 6 L.W. 640 Mr. Justice Sadasiva Ayyar once again expressed the same view. Mr. Justice Spencer seems to think that the matter requires further consideration. The learned Judge does not give any definite opinion on the point at issue. Mr. T.R. Ramachandra Ayyar attacked the view of Mr. Justice Sadasiva Ayyar on two points. I do not think that the criticism really affects the main conclusion at which the learned Judge has arrived. It is true that his reference to *Soobah Doorgah Lal Jha v. Rajah Neelanund Singh* (1847) 7 W.R. 74 as a Dayabagha case is not quite accurate, and something may be said also against his reference to the Privy Council decision, but the principle enunciated by him has my entire approval.

14. Some other cases were referred to by Mr. T.R. Ramachandra Ayyar, viz., *Sami Row v. Eliavatha Row* (1905) 16 M.L.J. 357 and *Gharib Ullah v. Khalak Singh* ILR (1903) All. 407. In the first of these cases the property dealt with was the self-acquired property of the testator. The second case has really no bearing upon the point. The learned vakil referred to the enactments dealing with guardianship,

viz., the Court of Wards Regulation, the Guardians and Wards Act and the Widow Remarriage Act and contended that these legislative provisions preserve the right of a Hindu father to appoint a guardian. I do not think these Acts give any statutory authority for the appointment of a testamentary guardian in respect of coparcenary property. They only refer to cases in which such power of appointment is permissible under the law, for example, cases of self-acquired property in Madras or the Dayabagha property in Bengal.

15. The case has been very fully argued by the two learned vakils, and my answer to the question referred to us is in the negative.