

(1956) 08 MAD CK 0043

In the Madras High Court

Case No : Letters Patent Appeal No. 30 of 1956

Medai Dalavoi T. Kumaraswami Mudaliar

APPELLANT

Vs

Medai Dalavoi Rajammal

RESPONDENT

Date of Decision : 30-08-1956

Acts Referred:

Guardians and Wards Act, 1890 — Section 19, 25

Citation : AIR 1957 Mad 563

Hon'ble Judges : Rajamannar, C.J;Panchapakesa Ayyar, J

Bench : Division Bench

Advocate : R. Ramamurthy Iyer, for the Appellant; Venugopalachari, for the Respondent

Judgement

Panchapakesa Ayyar, J.—This is an appeal by one Dalavoi Kumaraswami Mudaliar against the order of Ramaswami J. in A. A. O. No. 83

of 1955, reversing the order of the District Judge of Tirunelveli, dismissing O. P. No. 19 of 1954, filed by his wife Rajammal alias Valliammal, for

making her the guardian of the person of her two minor sons, Shanmuganatha Mudaliar and Subramania Mudaliar, and appointing her the guardian

of the persons of those two minor children, subject to certain terms, like sending the children for two days in the week and on other auspicious

occasions to their father, undertaking not to alienate the affections of the children from the father, educating the children properly, etc.

2. We have perused the entire records and heard the learned counsel on both sides. The facts were briefly these: Kumaraswami Mudaliar, the

appellant before us, belongs to an ancient, rich and aristocratic family of Tondaimandalam Mudaliars in Tirunelveli town, called the Dalavois. He

had married in his own caste, according to caste rites, but that lady died in 1926.

Even when she was alive, Kumaraswami Mudaliar began

keeping one Kalyani alias Papammal, a lady belonging to the Vellala caste, as his exclusively kept concubine from 1919 onwards. By her he had

five children, four sons and one daughter.

He has constructed for his concubine and her children a house called ""Kalyana Mahala"" in the very same compound, as the family mansion

Dalavoi hall"". He has educated all the children of the concubine and has celebrated the marriage of his illegitimate daughter in grand style. In 1932,

he married, as his second wife, Rajammal alias Valliammal, the petitioner in the O. P., who was no other than his sister's daughter. By her he has

three sons and one daughter. The eldest son has become a major and is studying in college.

Till 1954, Rajammal and her four children were living in ""Dalavoi hall"" with Kumaraswami Mudaliar and his mother Ulagammal, while the

concubine Kalyani and her children were living in the same compound in ""Kalyana mahal"" without any friends or quarrels. Before Kumavaswami

Mudaliar married Rajammal, he had settled considerable properties on his illegitimate children, claiming that he had the right to do so as he was the

sole coparcener at that time. That settlement is now being disputed" by Rajammal and her eldest son.

3. In 1954, there began trouble of a grave nature. Ranganayaki Anni, Rajammal's daughter, had become 17 and of marriageable age. . Rajammal

wanted her to be married to her own brother, that is, the girl's maternal uncle, just as she had married Kumaraswami Mudaliar her own maternal

uncle. Kumaraswami Mudaliar would not agree to this, but was bent upon marrying her off to a boy of his own choice, considered by Rajammal

and her father to be of low status and unfit for Ranganayaki Anni.

Rajammal's father filed O. P. No. 16 of 1954 under the Guardian and Wards Act for removing Kumaraswami Mudaliar from the guardianship of

Ranganayaki Anni and for appointing another as the guardian of her person. In that petition, there was an interlocutory application for the

intermediate custody of Ranganayaki Anni. In that application, Kumaraswami Mudaliar gave the Court ""his word of honour"" that he would consult

his wife and daughter before fixing up a bridegroom and would respect their wishes. On that undertaking, these proceedings were closed on 15-4-

1954. But despite such undertaking and word of honour, Kumaraswami Mudaliar selected as bridegroom for Ranganayaki, without consulting her

or Rajammal, a boy called Thirumalayappan, who had studied only upto IV form and came from a humble family, and was drawing a low salary of

Rs. 61 per month, and resolved to celebrate the marriage on 30-4-1954.

According to Rajammal, she remonstrated against the marriage and was, therefore, beaten and shut up in a room in ""Dalavoi hall"" and a tali was

forcibly tied round the neck of her daughter against her will when Rajammal was lying helpless in that other room. Thirumalayappan, however,

swore that Rajammal was lying in the hall when the marriage took place.

4. Shortly after the alleged marriage, Rajammal managed to escape from ""Dalavoi hall"" that very day. Then her eldest son, the College boy, filed a

petition u/s 100, Cr. P. C. before the District Magistrate, Tirunelveli, concerning the alleged forcible marriage and the detention of Ranganayaki by

Kumaraswami Mudaliar. Under the orders of the District Magistrate, Tirunelveli, the police produced the girl before the District Magistrate on 1-

5-1954, and, eventually, under the orders of this Court, that girl was entrusted to neutral custody at Madras. We may add that the marriage has

been declared null and void in subsequent proceedings, though an appeal is said to be pending.

5. When Rajammal fled from ""Dalavoi hall"" she left the two minors, Shanmuganatha and Subra-mania aged 11 and 5, in ""Dalavoi hall"". Later on,

she filed O. P. No. 19 of 1954, under Sections 7 and 10 of the Guardians and Wards Act, praying to be appointed guardian of their persons and

properties, or for some other suitable person to be appointed. Subsequently, she gave up the prayer to be appointed guardian of their properties,

and confined herself to the prayer to be appointed the guardian of their persons.

5a. The petition was hotly contested by Kumaraswami Mudaliar. His main contention was that, as a Hindu father, he was entitled to be the

guardian of his minor sons, and that the Court had no right to appoint any other guardian, unless he was declared unfit to be the guardian on valid

and proper grounds, none of which existed in this case.

6. The learned District Judge considered the three grounds urged by Rajammal's counsel as rendering Kumaraswami Mudaliar unfit to be the

guardian, and found them all to be insufficient. The first was that Kumaraswami

Mudaliar was keeping a concubine, Kalyani, and that too in a house in the same compound as his wife and legitimate children. The learned District Judge held that this concubine had been kept to the knowledge of Rajammal even before she married Kumaraswami Mudaliar.

He remarked ""if at all, it is the mistress who should be aggrieved on account of the subsequent marriage of the petitioner"" and held that ground to

be without force. The second was that Kumaraswami Mudaliar had not only settled considerable properties on the illegitimate children by Kalyani

before he married, Rajammal, but had also, on receiving a notice of demand for partition by his eldest son, the college boy, effected a partition of

all the joint family properties between himself and his sons, legitimate and illegitimate, in equal shares, thus practically giving the illegitimate sons a

larger share than the legitimate sons, as they had got considerable properties already under the prior settlement, and were being given equal shares

now, and stood a chance of ultimately getting Kumaraswami Mudaliar's share also.

The learned District Judge considered this too to be an insufficient ground, as the act of Kumaraswami Mudaliar, a Sudra, was in consonance with

the decision of this Court in *Deivanai Achi and Another Vs. R.M. Al. Ct. Chidambaram Chettiar and Others*, , and nothing in consonance with law

could be held to be an improper act unfitting a person to be a guardian. The third ground relied on was the alleged forcible marriage of

Ranganayaki Anni to a man of humble origin, means, education, and salary without consulting the girl or Rajammal as agreed to by him in open

Court.

As the matter was sub judice then, and the marriage had not been declared null and void, the learned District Judge rejected also this ground of

alleged unfitness. He found that, as late as 1949, a group photo had been taken by Kumaraswami Mudaliar with Rajammal and his legitimate

children and Kalyani and her illegitimate children, all standing cheek by jowl, thus showing that they were all getting on harmoniously. He relied also

on the fact that the elder of the two minors Shanmuganatha Mudaliar had, on being questioned in Court, expressed his preference to stay with

Kumaraswami Mudaliar.

He also considered that it was not advisable to deprive Kumaraswami Mudaliar of

the custody of the minor sons, and to give the custody at least to Rajammal, as that might perpetuate the strife between husband and wife. For all these reasons, he dismissed O. P. No. 19 of 1954 and did not

give even the custody of the children to Rajammal while rejecting her prayer to be appointed guardian of their persons.

7. Rajammal filed A. A. O. No. 83 of 1955 in this Court. Ramaswami J. held that, owing to change of times and ideas regarding morality and

propriety, and owing to the extraordinary situation in this case illustrated by the three facts of alleged unfitness and the fact of the death of

Kumaraswami Mudaliar's mother, leaving no lady in "Dalavoi hall" to take care of the two minors who would, therefore, become latch-key

children neglected and left to their own recourses, and consigned to the care of the servants, it was desirable to entrust their custody to Rajammal,

and ultimately made her the personal guardian subject to the terms already mentioned, setting aside the learned District Judge's order. His order is

now appealed against.

8. Mr. Ramamurthi Aiyar, the learned counsel for the appellant urged that Ramaswami J. erred in his interpretation of Section 19(b) of the

Guardians and Wards Act and that he had not declared Kumaraswami Mudaliar unfit to be the guardian of the persons of these two minors before

appointing Rajammal the guardian of their persons. We cannot agree. Ramaswami J. has correctly interpreted Section 19(b) and has stated in

paragraph 7 of his judgment "If the application is by any other person, then it should be shown that the father was unfit to be the guardian of the

persons of the minors.

Later on, he gave various reasons for holding that the father was unfit to be guardian of the person of the minors. The next contention of Mr.

Ramamurthi Aiyar was that the reasons given by Ramaswami J. for holding that Kumaraswami Mudaliar was unfit to be guardian of the persons of

the minors were not clinching or convincing, and that the learned Judge himself had indicated that Kumaraswami Mudaliar was not unfit to be the

guardian of the minors : He relied on the following passage :

In any event, that is not the surrounding to which we must subject these children at the present moment. It may be different when things settle

down and more normal relationships are resumed, which naturally is the desire

of all of us. I do not like to see a respectable family torn asunder and being dragged from Court to Court and its intimate affairs published and publicised. This Kumaraswami Muuanar has not how got the assistance of his mother who was a restraining and respectable influence in an otherwise disturbing state of things. This lady died within a few days of the alleged marriage. Though nothing for the purpose of the petition can be said against the character of Kumaraswami Mudaliar as father, his capacity to successfully function as such has become very inadequate, and the children, if sent to him, would only drift into what has been called by the Americans as latch-key children.

He urged that a reading of the learned Judge's judgment as a whole would show that he was only concerned with Kumaraswami Mudaliar's unfitness for the moment to have the custody of the children tilt the dispute with his wife, the dispute over his daughter's marriage, the dispute over the settlement, and the dispute over the partition were all amicably settled, and that there was no finding that owing to a defect of character or conduct Kumaraswami Mudaliar was permanently unfit to be the personal guardian of the two minors, but that ultimately, the learned Judge had continued the sentence "'I direct that the mother be given the custody of the children'" with the further and unexpected clause "'and made their personal guardian.

He urged that none of the circumstances relied on by Rajammal as making Kumaraswami Mudaliar unfit to be the personal guardian of the minors, would stand scrutiny, and that the learned District Judge was right in rejecting all of them. Thus, regarding his keeping the concubine, Kalyani, he urged that the learned District Judge's remark "'If at all, it is the mistress who ought to be aggrieved on account of the subsequent marriage of the petitioner,'" was correct. We cannot agree.

Civilised society all the world over refused equal status to a concubine with a wife and has never given a concubine a right to object to her paramour's marriage, or to make a grievance of it. It has always encouraged marriage, and even a regularisation of the concubinage by subsequent marriage if legal. Of course, Mr. Ramamurthi Aiyar may be right in showing that the practice of keeping such exclusively-kept concubines by such aristocrats is long-standing, and has not been held by itself, to incapacitate a

person from being the guardian of his legitimate minor children.

By itself that may be so. But, combined with the alleged forcible marriage of a legitimate daughter, giving more property to his illegitimate children,

beating and confining the mother of the legitimate children, etc., it will alter the situation materially. Mr. Ramamurthi Aiyar urged that the concubine

Kalyani is very old now, and so her influence for evil, even if it did exist, has become extinct. But, as an ancient sage has remarked, ""Lust decrees

with age, but greed increases.

Mr. Venugopalachariar, the learned counsel for Rajammal, urged that it is the concubine who is responsible for the unequal division of the family

properties by Kumaraswami Mudaliar. Mr. Ramamurthi Aiyar replied that the partition is still a matter of dispute, as it is sub judice and added that

even if Kumaraswami Mudaliar gave his concubine's children practically a greater share than his legitimate children, it was because his mother had

left properties worth two lakhs to the legitimate children alone. We cannot see how this will be a justification for an unequal division of family

properties by a father, if it is really proved.

9. Mr. Ramamurthi Aiyar contended that the decision of the Court declaring Ranganayaki Anni's marriage null and void is now under appeal, and

that matter also is sub judice and cannot be taken into account for holding Kumaraswami Mudaliar unfit. He also urged that the elder of the two

minors, Shanmuganatha Mudaliar, has expressed his preference to remain, with his father Kumaraswami Mudaliar, and that Ramaswami, J.'s

remark that the youngster did, so, as he would naturally prefer an undisciplined life with the father, who was neglecting and petting and spoiling him,

rather than with the mother, who will be sharp with him to see that he studies properly, eats properly, rests properly and grows up into a useful

person, is contrary to normal human experience.

He contended that a father is a greater force for discipline than the mother, who is likely to pet and spoil the child. But he forgets that

Kumaraswami Mudaliar is alleged to be practically spending his whole time with his concubine and her children and neglecting the two boys,

leaving them to the tender care of servants, with no woman also to take care of them. With such a father, there will be no discipline, for the boys

who will only be petted off and on whenever he happened to go to Dalavoy Hall,

in order to keep them quiet and attached to him, especially when the need to keep them on his side, as against the mother, is there.

10. Mr. Ramamurthi Aiyar then urged that it is not as if Kumaraswami Mudaliar drove Rajammal out of the "Dalavoi Hall" and, that it is open to

her to return there and live with Kumaraswami Mudaliar and these children, or, at least, with these children, even if Kumaraswami Mudaliar spends

his time at Kalyana Mahal with the concubine and her children. But, if the allegation of Rajammal, that she fled for her safety after the forcible

marriage of Ranganayaki Anni, is correct, there is little difference between such flight and a driving out. It may be that sense will dawn on both

sides and that there may be a reconciliation between Kuamraswami Mudaliar and Rajammal.

That is a consummation devoutly to be wished. But as things stand at present, we have the fact that Kumaraswami Mudaliar is attached more to his

concubine and his children by her than to his wife and his children by her, and that the wife, Rajammal, the eldest son and the daughter,

Ranganayaki Anni are all against him. We do not attach much importance to the expression of preference by Shanmunatha. He is a tender boy.

Such boys are easily tutored to say things even by small gifts of sweets, trinkets, etc. They also say things, without any gifts, suiting the persons with

whom they are living. As Mr. Venugopalachariar urged, if Shanmuganatha were to be called now and asked with whom he would prefer to stay,

he might very well say that he would prefer to stay with his mother, with whom he is living now.

11. From all the above discussion, two facts emerge clearly. The first is that it has not been conclusively made out that Kumaraswami Mudaliar is

permanently unfit to be the personal guardian of his children and, therefore, no other personal guardian can be appointed for these children u/s

19(b) of the Guardians and Wards Act, which lays down ""Nothing in this Chapter shall authorise a Court to appoint or declare a guardian of the

person of the minor whose father is living and is not in the opinion of the Court unfit to be the guardian of the person of the minor."" Secondly at the

same time, it is clear that he is at present, and till the four matters referred to above -- the settlement, the partition, the marriage of the daughter and

the dispute with the wife -- are settled finally not fit to have the custody of these

minors, as his interests are adverse to theirs in all those disputes.

We consider it quite possible under the law to give custody of these two minors, till further orders, to the mother Rajammal, who has only these

children to look after and can concentrate on them, and is whole-heartedly interested in their welfare and in fighting out their rights, while keeping

the guardianship of the persons in the father, Kumaraswami Mudaliar.

The guardianship of the father has been considered to be a sacred trust and a right which should not be taken away from him unless he is proved to

be utterly unfit. We agree with Mr. Ramamurthi Aiyar that "a greater fitness" cannot be urged either by the mother or by any other person in order

to supersede the father as guardian of the persons of his minor ions. To supersede him, it must be proved that the father is permanently unfit to be

the guardian, which has not been proved in this case.

Ramaswami, J., himself has only considered that Kumaraswami Mudaliar is for the present, and till the disputes are all settled, unfit to be in custody

of the minors a view with which we wholly agree. But that need not involve the appointment of Rajammal, the mother as guardian. It is enough if

the custody of the children is given to her till further orders.

12. The Hindu Law, governing the parties vests the guardianship of the minor in the Sovereign as *parens patriae*. Manu, Gautama, and others are

specific about this. The father and next to him, the mother, are only delegated by the State with this duty, the supreme consideration being the

welfare of the minor and nothing else. No doubt, the only person" who can compete with the father as natural guardian on an almost equal place is

the mother, though even she is only second to him.

Wherever the welfare of the minor, the paramount consideration, requires it, the Court can certainly give the custody of the minor to the mother.

This, in our opinion, can be done even in a petition by the mother to be appointed personal guardian of the minors, as here, where the guardianship

is denied her as the father is not permanently unfit, but where circumstances show that the custody of the minors ought to be entrusted to the

mother.

It need not be always the case that the mother should be already in the custody of the minors in order to continue her custody. Suppose, for

instance, the mother flees from the house in circumstances similar to those alleged by Rajammal, leaving her suckling babe behind, the Court can

certainly give her the custody of the suckling babe, as it is in the interests of minor, even though she is not already in such custody.

13. There is an appreciable difference between custody and guardianship. If Kumaraswami Mudaliar is deprived of the guardianship of these

children, he ceases to have any right to move the Court regarding them, whereas if he continues to be the guardian, and only the custody is given to

Rajammal, he can always move the Court for returning the custody to him whenever he proves circumstances justifying it So too, for getting a girl

married, or for sending a boy for education abroad, and such like matters, the guardian will have powers, whereas if he is not the guardian he may

have no such powers. Guardianship is certainly a more, comprehensive and more valuable right than mere custody. In our opinion, when the more

comprehensive right of guardianship is asked for by the mother but is not given it, as the evidence on record is not sufficient to do so, the lesser

right of custody, could be given, if that is justified on the evidence.

14. A Bench of the Bombay High Court has in Bai Tara v. Mohanlal Lallubhai, AIR 1922 Bom 405 (B), given the mother custody of a boy of

seven as against the father, while not disturbing the father's guardianship, as it was in his interests, and for his welfare that he should have his

mother's care. Macleod, C. J., has remarked in that case,

The petitioner has married again and it is obvious that the boy, who was only 7 years old at the time this application was made, will be much

better off living with his mother than with his father..... That, of course, will not prevent the father from making a further application at any later

date when he may be able to satisfy the Court that it will then be to the interests and welfare of the minor that he should leave his mother's care

and live with his father.

Shah, J., has observed:

On that footing the only question is whether it is for the welfare of the minor that the existing custody of the mother should be disturbed. It is

unfortunate that owing to the differences between the father and the mother it has become necessary to consider this question and it is still possible

that in future these differences may be made up and that the interests of the

minor may be advanced by the co-operation of the father and the mother in that respect...The boy is of tender age and I think that at present the personal care of the mother is a paramount consideration.

15. Another Bench of the Bombay High Court, consisting of Beaumont, C. J., and Wadia, J., has in *Saraswatibai Shripad Ved Vs. Shripad*

Vasanji Ved, given the custody of a minor child to the mother as against the father, while not disturbing the father's guardianship. Beaumont, C.

J., remarked:

I think the law on questions of this sort is the same in this country as in England, though, of course, social habits may be different. The modern

view of Judges in England is that it is impossible, in the case of a young child, to find any adequate substitute for the love and care of the natural

mother. If the natural mother is a suitable person, the Courts in England will as a general rule band over the custody of a child of tender years to the

mother.

The mother's position is regarded as of much more importance in modern times than it was in former days, when a wife was regarded as little

more than the chattel of her husband. The view of society in India as to the position of women may not have advanced so far or so fast as in

England, but at the same time, the right of the mother to the custody of her young children is undoubtedly recognised in this country.

However, the paramount consideration is the interest of the child, rather than the rights of the parents. Human nature is much the same all the world

over, and, in my opinion, if the mother is a suitable person to take charge of the child, it is quite impossible to find any adequate substitute for her

for the custody of a child of tender years.

He further observed:

The parents unfortunately are not living together, and probably will not live together, because the father has contracted marriage with another

woman. That under Hindu Law he is entitled to do, but it is difficult to suppose that a step-mother, whose age we are told is about 17, is likely to

be a good substitute for the natural mother; whilst the father himself will have other occupations and will have to entrust the actual upbringing and

charge of a child of this age to somebody else.

In my opinion, there is not the slightest doubt that the natural mother is the proper person to have the custody of the child, and there is no evidence before the Court to justify us in thinking that she is not a proper person to have that custody. Her parents appear to have adequate means to maintain her and the child. The father is, of course, entitled to access to his child. Probably there will be no difficulty in arranging that. If there is, he will have to apply to the Court to arrange the circumstances in which he can see his child.'"

Wadia, J., has remarked as follows:

Taking all these circumstances into consideration, I think that at present the custody of the child should be with the mother. But that will not, as has been pointed out by the learned Chief Justice, prevent the father from making a further application to the Court at any later date, under the liberty reserved to him to apply, when he may be able to satisfy the Court that it will then be in the interest and for the welfare of the minor child on account of the mother's health or the child's health, or on account of want of means for maintenance, or on any other just and reasonable ground, that it should leave the mother's custody and instead live with the father. He also remarked that the guardianship of the father is in the nature of a sacred trust and should not be lightly disturbed, though the custody may be given to the mother for some time.

16. In *Kaliappa Goundan Vs. Valliammal*, a Bench of this Court, to which one of us was a party, handed over the custody of a minor girl to the mother as against the father, while not disturbing his guardianship, holding that it is impossible to find an adequate substitute for the mother for the custody of a child of tender years, and that it is in the interests of the child, whose interests should be the paramount consideration with Courts, that the mother should have the custody.

17. So, we modify *Ramaswami, J.*'s order by deleting the provisions appointing *Rajammal* as the guardian of the persons of the two minors, and merely giving custody of the two minors to *Rajammal* till further orders and subject to the terms mentioned by him while retaining the guardianship in *Kumaraswami Mudaliar*. Mr. *Ramamurthi Aiyar* had urged in the appeal petition that the terms regarding the sending of the children for two days in a week to the father, etc., were impractical and unworkable.

But he admitted that the terms have been carried out and have been working satisfactorily so far. The proof of the pudding is in eating, and what is

working satisfactorily cannot be termed to be unworkable. We see no reason to interfere with the terms. Mr. Venugopalachariar was quick to take

advantage of these allegations in the appeal memo. He asked for the deletion of those terms as unworkable.

As already stated, they have been worked, and are workable, and there is no reason whatever to delete those terms, which, in our opinion also,

are calculated to protect the interests of the father and are in the ultimate interests of the minors themselves. The minors should, as far as Courts

can guarantee, get the continued affection of both father and mother, and not merely of either, and these terms are calculated to achieve that end.

18. In the circumstances, all the parties to this Letters Patent Appeal will bear their own costs.