
(1969) 12 MAD CK 0018

In the Madras High Court

Case No : O.S. Appeal No. 51 of 1968 and C.M.P. 1979 and 15821 of 1969

Pamela Williams

APPELLANT

Vs

Patrick Cyril Martin

RESPONDENT

Date of Decision : 19-12-1969

Acts Referred:

Guardians and Wards Act, 1890 — Section 25

Citation : AIR 1970 Mad 427 : (1970) ILR (Mad) 82 : (1970) 83 LW 206 : (1970) 2 MLJ 539

Hon'ble Judges : K. Veeraswami, C.J;Somasundaram, J

Bench : Division Bench

Advocate : Leelie Settharaman, for the Appellant; K.S. Varadachari and Jagannathan, for the Respondent

Final Decision : Allowed

Judgement

Somasundaram, J.—This is an appeal against the order of Ismail, J. in an application by the appellant, a mother, under the Guardians and

Wards Act (hereinafter called the Act), for custody of her female child, Mary Charmine Martin, aged 14, from the respondent, the putative father,

after a declaration that she is the natural guardian. The parties are Anglo-Indians, professing the Roman Catholic faith. They live at Royapuram,

within the Madras city limits.

When the appellant was barely 17 years of age, respondent, who is her mother's sister's husband, seduced her. This was in the year 1950. R. W.

2, Mrs, Martin, his wife, being frail, fickle minded and sickly, could not prevent this illicit intimacy between these two. The appellant became more

and more involved, and she gave birth to the female child with whom we are now concerned on 8-9-1955. She lived with the respondent till the

year 1963, and during this period, she was ill-treated and beaten occasionally by the respondent when he was under the influence of drink to which

he was addicted. Too often he was in financial difficulties and impecunious circumstances.

Two of the maternal aunts of the appellant. Mrs. Rennie Tuck and Mrs. E. A. Day live permanently in England. During the year 1963, the appellant

also left India for England, leaving the child with the respondent, with a view to build a future.

There she secured a job of a short-hand writer cum-secretary on a salary of ₹17-15 per week. She also got herself married to one Hugh

Williams, and through him she has no Issues so far. She was remitting moneys and sending presents to her child, as will be evident from the

acknowledgments (Ex. P. 7 series).

Meantime, in India the respondent was adjudged insolvent in the year 1966 in I. P. 43 of 1966, and it is stated that he has since been discharged.

During December 1967, the appellant came over to India and resolved to take the child with her to England with a view to give her a decent life,

good upbringing and sound education. It appears that at first the respondent agreed for this course, though he How states that he consented only

for a temporary sojourn of the child for a holiday. The appellant had approached the High Commissioner of the United Kingdom at Madras for this

purpose and she had obtained Ex. p. 1, a declaration of sponsorship for this child. The respondent appears to have changed his mind and he did

not even send her a reply to the letter written by the appellant in April 1968, through her solicitors. This refusal on his part resulted in the Initiation

of proceedings by the appellant u/s 25 of the Guardians and Wards Act, for securing custody of her child for taking it to London.

2. The appellant, in her affidavit, averred that it is not in the good interest of the child to continue to live with the respondent, his sickly wife, and

their adult son aged 21, that the atmosphere is not quite congenial, and that the welfare of the minor required it to be taken away from the

environment. The respondent denied the allegations and resisted the claim stating that the removal of the minor from his custody and delivering her

to the appellant, who lives in London, outside the jurisdiction of this Court, would not be legally permissible, because it would be Impossible for

this Court to exercise any jurisdiction and effective control over the appellant when once she left the shores of India. He further contended that the appellant was not also entitled to ask for custody of the child u/s 25 of the Act.

3. Ismail, J. took the view that the mother is not the natural guardian and that no order could be passed in her favour, since she lived outside the jurisdiction of this Court. On merits, he was inclined to take the view that there was not much substance in the several charges levelled against the respondent, and that In his view, the interests and welfare of the minor did not require a removal away to England. The child when examined by him had expressed its definite preference to live with the respondent and his family with the result, the learned judge upheld the respondent's contentions in law, and on merits, and dismissed the application. The mother in this appeal challenges the correctness of this order.

4. We have heard counsel on both sides in full, and have given the matter our most anxious and careful consideration. With respect, we are unable to agree with the view of Ismail, J. and we are fully satisfied that the good interests and welfare of the infant require that she should stay with her mother in England, enjoying and having the full benefit of a happy environment and surrounding with ample facilities for good education.

5. We shall first dispose of the legal objection regarding the right of the appellant to maintain this petition. Since the parties are Anglo-Indians, the two systems of personal law prevalent in this country, the Hindu law and the Mohame-dan law, will not apply to them. Both before Ismail, J. and before us, arguments proceeded on the accepted basis that the law applicable to the instant case, is the English law. Ismail, J., after considering the decisions, has held that the appellant is not the natural guardian of the minor daughter, and that as such she is not entitled to maintain the application u/s 25 of the Act.

The law in respect of the relationship between the illegitimate child and its putative father on the one hand, and the mother on the other, has been stated in Eversley on Domestic Relations, VI Edn, at page 440, as below:

According to the older law, neither the putative father nor the mother of an illegitimate child had the legal right of guardianship, but the tendency of the modern law is to recognise the mother not only as the natural but the legal guardian of her bastard child and entitled to its custody unless there

are very strong reasons for displacing her right so that she may sue out a writ of Habeas Corpus for the recovery of its person from strangers into

whose custody she had delivered it and if her choice of a home would be beneficial to the interests of the child, the Court will order it to be

delivered up in order that it may go to such new home; but this right of the mother is not absolute.

The statement of law in Halsbury's Laws of England, 3rd Edn. at page 108 is as follows-

The father of an illegitimate child, so long as the child remains illegitimate, is not generally recognised by the law of England, for civil purposes. He

is under no obligation to provide for the child, in the absence of any affiliation order, unless he had adopted it de facto or obtained an adoption

order. But he may make a binding contract with the mother to contribute towards its maintenance; this is terminated by the death of the mother.

At page 109, it is stated-

Unless he has obtained an adoption order, the father has no right to the custody of the child, even though he is in a better position to maintain it

and he cannot appoint a guardian for it by will. Whenever he is in lawful custody of the child, the Court will protect his right.

At pages 106-107 it is stated as below;

A mother is bound to maintain her illegitimate child until the child attains the age of 16. If the child is committed to the care of a fit person or sent

to an approved school (as, for example, where the child is in need of care or protection or is a juvenile offender) or if the child is received into the

care of a local authority, the mother is liable to make contribution towards the upkeep of the child until the child attains the age of 16. The

mother's obligation to maintain involves a right to the child's custody, which the Court will protect by Habeas Corpus, and in determining any

question as to custody, the Court will have primary regard to the wishes of the mother even as against the father. She has also the right to

determine the religion of her child, so long as her duty to support the child remains; and her consent is required to the marriage of the bastard child

while an infant, unless she has been deprived of the child's custody by order of the Court or a resolution of a local authority is in force assuming

parental rights. She may have the right to certain allowances and benefits in

respect of the child.

6. The position, as emerged from the decisions of Courts in England, was summarised by Slessor, L. J. in *In re J. M. Carroll, an infant*, 1931 1 KB

317, as follows:

In the eye of the law such a child is *filiius nullius* and has no legal guardians *R. v. Felton* 1758 1 Bott, P. L. C. 478. The mother's legal rights as to

custody are not entirely the same as those of the father of a legitimate child; *Barnardo v. McHugh*, 1891 AC 388; *Rex v. Walker*, (1912) 28 TLR

342. Yet, nevertheless, while the child is under the age of nurture, the mother has a right to its possession; generally In such a case the Court will

prefer the mother to the putative father if there be conflicting claims; *Ex parte Knee*, (1804) 1 B & P 148. Though the mother of an illegitimate

child is thus not a legal guardian, her claim upon the child has always been recognised in equity. The mother has a natural right to its religious

education and custody which will be regarded by the Court, *Reg v. Hash* 10 QBD 454. She has by law obligations Imposed upon her in respect

of the child; 1891 AC 388; a contract between her and another person for the transfer to that person of her rights and liabilities is invalid:

Humphrys v. Polak, (1901) 2 KB 385.

Lord Coleridge, C. J. in the *Queen v. Thomas C. Lewis*, (1893) 9 TLR 226 observes as under:

The persons *prima facie* entitled to the custody of illegitimate children is the mother. Now, there can be no doubt that there is one person who, by

his conduct throughout (here a case of seduction of a lady), ought not to be entrusted with the children, and that is the putative father. It is clear to

my mind that to allow him to profit by his own inequity and to hand over to him these children would be an outrage upon justice. To that I never

would consent. That, however, does not dispose of the case, because the object to be looked at by the Court in these cases is the welfare of the

children and painful and distressing as it may be, it might be the duty of the Court to take the children both from the father and from the mother.

The Court has jurisdiction to do so, but It must be a very strong case to induce the Court so to act. The mother is the natural guardian and why

should we step out of our way to take away that, which nature and the common law entitled her, without any adequate reason for doing so?

Denning, L. J. in *In re H (an infant)*, 1955 3 WLR 320 observes as follows:--

The father of an illegitimate child does not even have the status of a "parent" to give his consent to the adoption The reason is that the law of

England has from time immemorial looked upon a bastard as the child of nobody, that is to say, as the child of no known body except Its mother.

The father is too uncertain a figure for the law to take any cognisance of him, except that it will make him pay for the child's maintenance if it can

find out who he is. The law recognises no rights in him in regard to the child, whereas the mother has several rights. She has the right of the custody

of it during her lifetime, until It is 14 years of age whereas the father has no right to its custody either during her lifetime or even after her death.

7. Lord Evershed M. R. in *re O (an infant)*, 1962 1 WLR 724, has held that it is the duty of the Court to treat the welfare of the children as the

paramount consideration in such cases. That case related to the custody of two illegitimate children, a boy and a girl and *Fennyculck, J.* committed

both to the care and control of the mother. The father preferred the appeal and Lord Evershed M. R. taking a "longer view of the matter" brushing

aside "the immediate unhappiness of the Inevitable parting" entrusted the boy to the custody of the father and the girl to the custody of the mother,

observing that such a course was to the welfare of the children.

8. From the above, it will be seen that the tendency of modern law as stated in *Eversley on Domestic Relations* is to recognise the mother not only

as the natural but the legal guardian of her bastard child, and entitled to its custody unless there are very strong reasons for displacing her rights.

The mother in this case has not in any way disintitiled herself either by her conduct or by neglect or by abandonment and on a long-term view of

the matter, we are of the opinion that the mother should be regarded as the natural guardian of the illegitimate child, and that the change of custody

from the respondent to the appellant will only be for the child's benefit.

9. We do not also see as to why the mother is not entitled to apply for custody u/s 25 of the Act. She is not guilty of any misconduct and all along

she has been in touch with the child, sending moneys and presents. The letters (Exs. P. 3 to P. 6) exhibit her anxiety and attachment. Ex. P. 1, the

declaration for sponsorship, shows as to how anxious she was to take the child with her for giving it a good education. *Venkatarama Ayyangar Vs.*

Thulasi Ammal, lays down that the word "guardian" in Section 25 is used in a wide sense and does not necessarily mean a guardian duly appointed

or declared by the Court, but would include a natural guardian or a de facto guardian. The mother who was not in fact having the care of the

person of the minor was entitled to apply u/s 25 of the Act. In (Kode) Atchayya Vs. Kosaraju Narahari, it was held that refusal by a person to

deliver the child to the natural guardian would amount in effect to a removal from custody. This decision was followed in Venkatarama Ayyangar

Vs. Thulasi Ammal, . Therefore, when there is a refusal to deliver the child to the mother, she can apply u/s 25 of the Act for custody.

In Mt. Parem Kaur v. Banarsidas, ILR Lah 630 : AIR 1934 Lah 1003 it was held that under the Hindu Law as the obligation to maintain the

illegitimate children was upon the putative father, he had the preferential right to the custody of the child. If the principle of this decision is applied to

the parties in the instant case who are Anglo-Indians, the mother on whom there is a duty cast to maintain, should have a preferential right to the

custody. It was also held in this case that for the purpose of Section 25 of the Act it was not really necessary that the applicant should be a lawful

guardian under the personal law. The appellant in this case had demanded the return of the child, and there was a refusal. This refusal would

amount to a removal within the ambit of Section 25 of the Act. With respect, we are unable to agree with the view of Ismail, J. that it is only the

natural guardian who would be entitled to apply for the custody of the infant.

10. How far this Court will have jurisdiction to entrust the custody of the child to the appellant who is permanently residing in England, and to

which place she desires to take the child will be the next question for consideration. On the authority of the decision, viz, T.N. Muthuveerappa

Chetti alias T.N. Batcha Chetty and Another Vs. T.R. Ponnusawmy Chetty, and Subburathnammal v. Seshachalam Naidu, ILR Mad 758 : AIR

1931 Mad 478 the learned counsel appearing for the respondent contends that the child could not be handed over to the appellant because this

Court will not have any jurisdiction or control over the child the moment it leaves the shores of India.

T.N. Muthuveerappa Chetti alias T.N. Batcha Chetty and Another Vs. T.R. Ponnusawmy Chetty, was a case where a father living at Bangalore

wanted to get at a motherless child, aged 5, which was brought up with all love and affection by the grandmother. The grandfather had gifted some properties also to this child. It was found that the relationship between the claimant father and this family was strained. When his wife was alive, he had harassed her by a suit for restitution of conjugal rights and also by a prosecution for theft etc. Further, there was also no female member in his house to look after this infant. While winding up the discussion on facts and after considering the welfare of the child, the Bench observed that the father was also residing beyond the Court's jurisdiction and that it would not be easy to control him. On all the above grounds, the application was dismissed. The Bench has not laid down any absolute proposition of law to the effect that the Court will have no jurisdiction to declare a person as guardian if he happened to reside outside its jurisdiction.

The mother of the child in ILR Mad 758 : AIR 1931 Mad 478 was a permanent resident in Mysore and she wanted to be appointed as a guardian. Following the judgment in T.N. Muthuveerappa Chetti alias T.N. Batcha Chetty and Another Vs. T.R. Ponnusawmy Chetty, the Bench, in a very short judgment, held that a person who is residing outside British India cannot be appointed as guardian of the minor under the Act, and as such refused to interfere, in her favour, with the order passed by the learned District Judge. It is important to note that this Bench dealt with a case of appointment of a guardian. Our attention was also drawn to the decisions in Mt Nazir Begum v. Ghulam Quader Khan, AIR 1937 Lah 797, Beni Prasad Vs. Mt. Parwati and Chimanlal Ganpat Vs. Rajaram Maganchand Oswal, where it has been held that there is nothing in the Act to disqualify a person residing outside the jurisdiction of the Court to be appointed as a guardian of the person of a minor.

11. The observations in ILR Mad 758 : AIR 1931 Mad 478 should be understood in the context of the facts of that case which dealt with an application for the appointment of a guardian. In the case of such an application, the Court is entitled to take into account the fact that the applicant is a resident outside India. The Court has ample jurisdiction to refuse a prayer for appointment, made by such a person. It is not really a limitation or inhibition on the jurisdiction of the Court, but is an important aspect touching the exercise of the discretion by Court.

These considerations may not weigh with the Court which deals with an application for mere custody u/s 25 of the Act. The applicant may be a

natural guardian, mother of a young child, and she may permanently reside outside India, and for that reason it cannot for one moment be said that

the Court lacks jurisdiction. We are, therefore, of the view that the decision in T.N. Muthuveerappa Chetti alias T.N. Batcha Chetty and Another

Vs. T.R. Ponnusawmy Chetty, which dealt with a case of declaration of guardianship, and the later decision in ILR Mad 758 : AIR 1931 Mad 478

which dealt with a case of appointment of a guardian, are distinguishable and would not apply to a proceeding for custody u/s 25 of the Act. That

apart, the jurisdiction of the Court is all embracing and wide under Clause 17 of the Letters Patent and it is not controlled by the restrictions

imposed on the Court exercising jurisdiction under the Act. So, we are of the view that the fact that the appellant is a permanent resident of

England does not disentitle her from getting custody of the child, to which she is otherwise entitled as its natural guardian.

12. The only question that remains for consideration is as to whether the custody of the child could be given to the mother ""by tearing it off"" from

the putative father. Decisions have repeatedly held that in these matters the Courts will have to be guided by the paramount consideration regarding

the welfare of the minor. Due regard (though not outweighing) must be had to the relative means of the parties for maintaining the child, the scope

for education and other identical matters. The moral and religious welfare of the infant must be considered, as well as its physical well-being. Due

regard must also be had to the ties of affection and the affluence and capacity of the appellant for building up a good career for the infant. Judged

by all these tests, we are satisfied that it is in the paramount Interest and welfare of the minor that the"" mother should have its custody. There is

evidence in this case to show that the father who is addicted to drink often indulged in acts of violence not only against his wife but also against the

appellant. The existence of an unemployed unmarried adult son, aged 21, in the family, is yet another circumstance which must be taken into

account in the instant case, particularly when we see that the respondent had seduced, for sexual life, the appellant who is in the relationship of a

daughter to him.

That apart, the respondent is admittedly in impecunious circumstances, and Ex. P. 8 the letter written by R. W. 2, the respondent's wife, to the

appellant, indicates the poverty in the family. This letter is as below:--

Thanks a million for the money you sent to both Noonoo (minor child) and me. Pam, you really don't know how hard we are finding to just on

pat's pay No extra money like we used to get when you were with us, he scarcely gets a ship once in two or three months. Charles too has no

job as yet and the price of food-stuffs has gone up so high it is dreadful now, my dear, to manage. We just don't know what to do for Christmas.

Now Pam, if I delay In writing, do excuse me as you know at times it is so hard to get a stamp. I have to wait till luck turns up. I will make up my

mind to go to Joan's wedding only if I get decent clothes and shoes Alice will find my house very shabby, compared to Dollys finery. But you

see that there are so many to help. I think the things will change soon. Pray for us. You have the means. God has blessed you.

This letter gives a correct picture of the atmosphere which now prevails in the respondent's house. The child is now aged 14 and as and when it

grows, the cost of maintaining and educating it gets increased.

As against all these, the appellant, the mother, is now well settled at London, and there is evidence to show that she has deposited substantial sums

in a Bank in England even during the short stay of a few years. Ex. P. 2, the letter from Mulard Ltd., London, shows that till 20-10-1967 they have

paid her ₹2.487 as salary. She has in her turn paid ₹2.81-3 as Income Tax. There is also one other circumstance which weighs with us. During

the year 1967, when the appellant had approached the respondent for taking the child to London, the latter had agreed, though he now says that it

was only for a holiday sojourn. Further in his objection statement as well as in the course of the hearing, both before the learned Judge and before

us, he has said that he has no objection to the child being taken away.

13. True, the inclinations of the child are for staying with the respondent, as indicated by her before Ismail, J., and before us. Even so, after

bestowing our anxious thought over the matter, we are satisfied that the child's inclinations ought not to prevail in this case. As observed in S.

Rama Iyer Vs. K.V. Nataraja Iyer, a child of tender age of 13 years cannot be said to be able to form an intelligent preference. It is also true that

in initial stages the child may feel the separation and the going abroad, but very soon thereafter it will get accustomed to the environments, surroundings and the life in the house in England.

In this connection, we may also refer to the passage of Eve, J. in *Thain in re Thain v. Taylor*, 1926 Ch D 676 -

It is said that the little girl will be greatly distressed and upset at parting from Mr. and Mrs. Jones. I can quite understand, it may be so. But at her

tender age, one knows from experience how mercifully transient are the effects of partings and other sorrows and how soon the novelty of the

fresh surroundings and new associations effaces the recollection of former days and kind friends and I cannot attach much weight to this aspect of

the case.

Vide also observations of Plowman, J. in *In re R (H) an infant*, 1966 1 WLR 1527 where *In re Tahin* 1926 Ch D 676 was followed.

14. Thus, we are satisfied that the mother, who has not in any way disentitled herself either by neglect or by abandonment, is, as the natural

guardian, the fit and proper person to look after the infant. We are also satisfied that the "tearing off the minor" from the custody of the respondent

and delivering her to the mother, will not also have any adverse psychological effect on the mind of the child. On a long-term view, the change will

be for the child's benefits. We direct that the custody of the minor, Mary Charmine Martin, shall be given to the appellant, the natural guardian.

The appeal is allowed and we make no order as to cost. C. M. P. 1979 of 1969 and 15821 of 1969 are dismissed.