
(1954) 11 MAD CK 0011
In the Madras High Court
Case No : O.P. No. 207 of 1954

Samuel Stephen Richard

APPELLANT

Vs

Stella Richard

RESPONDENT

Date of Decision : 02-11-1954

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 488
Guardians and Wards Act, 1890 — Section 17, 19, 25

Citation : AIR 1955 Mad 451 : (1955) CriLJ 1192

Hon'ble Judges : Ramaswami, J

Bench : Single Bench

Advocate : R. Purushottam, for the Appellant; T. Krishnaraja Nayakar, for the Respondent

Final Decision : Dismissed

Judgement

Ramaswami, J.—This is a petition u/s 25, Guardians and Wards Act.

2. The facts are: The Petitioner Samuel Stephan Richard married the respondent Stella Richard on 28-5-1941. Both are Protestant Indian

Christians and the Petitioner is an employee in the East Asiatic Company, Madras, drawing a salary of Rs. 75/- and clearness allowance of Rs.

47-8-0 per month and the respondent is a school mistress in an aided higher elementary school drawing a salary of Rs. 50/- per month. Out of this

union a daughter Priscilla was borne on 20-4-1942. They were living amicably in Chintadripet, Madras. Then after the father of the petitioner died

in June 1951, the petitioner and respondent moved to Pudupet and started living with the mother and sister of the petitioner. On account of the

differences between the mother-in-law and the daughter-in-law, apparently separate cooking seems to have been set up. This did not solve the

problem and there seems to ""have been bitter quarrels between the husband and the wife. Finally, on 31-7-1953 the respondent left her husband

taking with her her daughter. Then this respondent filed a petition u/s 488, Criminal P.C., M.P. No. 836 of 1953 in the Court of the Chief

Presidency Magistrate, Madras, claiming a maintenance of Rs. 35/- p. m. for herself and Rs. 20/- p. m. for her minor daughter. The learned Chief

Presidency Magistrate dismissed this petition taking a narrow view of ""cruelty"" entitling the respondent herein to refuse to live with her husband and

to get maintenance. Cruelty in Section 488 is not limited to personal violence causing danger to life, limb or health bodily or mental or as to give

rise to a reasonable apprehension of such danger. Where an act of violence is found to be such as to found a reasonable belief of further violence

or where it is of a very grave character itself the wife is entitled to relief. Even an accumulation of minor acts of illtreatment causing or likely to

cause suffering to the spouse to break down under the strain constitutes cruelty. If moral force is systematically exerted to compel the submission

of a wife, to such a degree and so long as to injure her health, although there be no actual violence, it amounts to legal cruelty.

Under the previous code cruelty recognised was legal cruelty as defined by the courts -- "Rukmin v. Pearelal", 11 AH 480 (A). Under the present

Code which does not contain the word "cruelty" a systematic course of, illtreatment and oppression is a good ground for the wife's refusal. -- Mt.

Kaluiya Vs. Hira, . It is unnecessary for me to canvass these findings further because I am not sitting in Revision thereon. It is sufficient to point out

that the learned Chief Presidency Magistrate considered the story of cruelty and illtreatment as exaggerated and that if the allegations made at the

trial were true those details would have found a place in the lawyer's notice sent prior to the petition for maintenance and that the only occasion of

beating by the husband proved was that he slapped her and shut her mouth with his hand when she was overtalkative even after P. W. 2 read out

the 6th verse in the 10th Chap. of St. Mark's Gospel, which counsels husband and wife to live amicably. The husband has thereupon filed this

petition for directing the respondent to deliver custody of the minor child Priscilla u/s 25, Guardians and Wards Act.

3. Both sides adduced no evidence and the minor girl was produced in Court by the mother. On my questioning the girl, who appeared to be

intelligent, she stated that she wanted to live with her mother only and not with her father.

4. In deciding the question of custody, the welfare of the minor is the paramount consideration. This is in conformity with the provisions of Sections

7 and 17 of the Act. The welfare of the minor has been pointed out as the guiding factor in Section 7 in the matter of appointment of a guardian.

Section 17 has specifically subordinated the personal law of the minor regulating guardianship to the paramount consideration of welfare of the

minor and certain directions in which the welfare of the minor should be considered are also given. Again, in Section 25 it is said that the Court

may order the return of the ward to the lawful custody of the guardian only if it thinks it necessary in the interests of the minor. What this "welfare

is has been considered in the decisions u/s 7 and the considerations mentioned in Section 17.

5. In "Mt. Mansa Devi v. Makhar", AIR 1936 Pesh 207 (C), Middleton J., clarified that the word "welfare" meant both material and spiritual

welfare of the minor. In -- "Ram Prasad v. District judge, Gorakhpur", AIR 1920 All 89 (D), the Allahabad High Court held that the word

"welfare" meant not only material but "moral" welfare as well. In-- In the Matter of Lovejoy Patell and Another, . Das J., held that the word

welfare" must be taken in its widest sense. The moral, or religious welfare of the child must be considered as well as its well being. Nor can the

ties of affection be disregarded". Also see -- "Boregowda v. Nanjamma", 53 Mys ICR 186 (F).

6. In other words, the test is as has been laid down in -- "In re Gulbai and Lilbai", 32 Bom 50 (G):

In making orders appointing guardians for the person of minors the most paramount consideration for the Judge ought to be -- what order under

the circumstances of the case would be best for securing the welfare and happiness of the minors? With whom will they be happy? Who is most

likely to contribute to their well being and look after their health and comfort? Who is likely to bring up and educate the minors in the manner in

which they would have been brought up by the parents if they had been alive.....

The English law, no less than Indian law, lays emphasis primarily on the welfare of the child. In "In re Mcgrath (Infants)", (1893) 1 Ch 143 (H);

Lindley J., said

The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money only,

or by physical comfort only. The word ""welfare"" must be taken in its widest sense. The moral or religious welfare of the child must be considered

as well as its physical well being. Nor can the ties of affection be disregarded"" ,

(See also -- "Akhoy Kumari Debi v. Hazari Dassee", AIR 1916 Cal 324 (I); -- "Sarat Chandra v. Girindra Chandra", 15 Cal WN 457 (J); --

"Asi Bi v. Girdhari Ram", AIR 1921 Lah 68 (K); -- Sundar Moni v. Bangsidhar", AIR 1914 Cal 875 (L); -- "Bindov. Shamlal", 29 All 210 (M);

-- Saraswathi Ammal Vs. Dhanakoti Ammal and Others, ; -- "Muthuveerappa Chetty v. Ponnuswamy Chetty", 22 Mad LJ 68 (O); -- AIR 1943

106 (Privy Council) ,

7. The principal considerations which have been laid down u/s 17 in order to secure this welfare are ten in number, viz., (a) Age (b) Sex (c)

Religion (d) Character and capacity of the proposed guardian (e) his nearness of kin to the minor (f) the wishes, if any, of the deceased parent (g)

Any existing or previous relations of the proposed guardian with the minor or his property (h) If the minor is old enough to form an intelligent

preference that preference has to be considered (i) In the case of former European British Subjects other things being equal, if the minor was a

male of tender years or a female, the minor was to be given to the mother and if the minor was a male of age to require education and preparation

for labour and business, then to the father (j) Subject to the provisions of Section 17, the Court shall be guided by what consistently with the law to

which the minor is subject appears in the circumstances to be for the welfare of the minor. These tests are no doubt laid down u/s 17 but are

equally applicable in considering the welfare of the minor u/s 25 of the Act. The application of these tests casts an arduous duty on the court. But

as has been repeatedly pointed out amongst the many and multifarious duties that a Judge in Chambers performs by far the most onerous duties are

those cast upon him by the Guardians and Wards Act. He should place himself in the position of a wise father and be not tired of the worries which

may be occasioned to him in selecting a guardian best fitted to assure the welfare of a minor and thereafter guide and control the guardian to ensure

the welfare of the Ward -- a no mean task but the highest fulfilment of the dharma of his own country; 29 All 210 (M)"; -- Manmohini Dasi

Vs. Hari Prasad Bose and Others, .

7a. In this case, considerations (c), (e), (f) and (g) do not arise and I shall examine the materials on record with reference to the other

considerations and find out whether a case has been made out for giving the petitioner the custody of the minor.

8. "Age" The first consideration that the Court should have is the age of the minor. It is only an extreme case where a mother may not have the

interest of her child most dear to her. Since it is the mother who would have the interest of the minor most at heart, the tender years of a child

needing the care, protection and guidance of the most interested person, the mother has come to be preferred to others. It is perhaps, the feeling

that the tender years of a child need the gentle and delicate and kind care of women & at that the mother that is responsible for this preference of

woman as against men. Under, Mahomedan Law women are preferred to men for the custody of the children. Under Hindu Law also in the case

of children of tender years, whatever may be the Hindu Law tests, Civil Courts have always been preferring the mother. u/s 17, former Sub-clause

(4) dealing with European British Subjects or Christians, in the male or female of tender years, personal guardianship has to be given to the mother.

9. In this case the girl Priscilla though aged 13 is a girl of delicate health and appears to be much younger than what her age is. In such a case it is

the mother who ought to have the custody of the child rather than the father who is living as a grass-widower with a paralytic mother who is not at

all attached to the daughter-in-law and who in fact was responsible for all this trouble between the husband and wife and who cannot be expected

to give that care and attention to the girl as the mother would,

10. Sex. u/s 31 of Act 20 of 1864 (Bombay) and Section 27 of Act 40 of 1858 (Bengal) no one other than a female can be appointed guardian of

the person of a female: -- "Fuseehun v. Khajo", 10 Cal 15 (R); -- "Bhoocha v. Elahi Bux", 11 Cal 574 (S); -- "Sohna v. Khalak Singh", 13 All 78

(T). In the present Act there are no words confining the guardianship of the girls only to females. Now any one can be appointed guardian

provided it was necessary for the welfare of the girl. The Court has ample powers

and wide discretion to make any order which may be necessary

with regard to the sex of the minor. But considerations of sex gain importance when we consider the age of the girl. In the present case the girl is

about 13 and will be soon attaining age and in that difficult period it should be the mother who should be in custody of the girl and not a

grasswidower father living with the paralytic grand-mother and in which surroundings the girl would run serious risks. Therefore the sex of the

minor assumes importance in deciding the question of custody.

11. "Character and capacity of the gnardian": It is quite true in this case from the point of view of bringing up the girl in a disciplined manner and

imparting good education for her, the mother is better fitted than the father. The mother herself is a school mistress and her sister Mrs. Edwin is a

doctor. The mother has been leading a proper family life and there is no allegation whatsoever against her moral character. On the other hand the

father is seen to be a weak-willed and ill-tempered man under the influence of his mother and sister and he has been treating his wife and daughter

badly. Otherwise, it stands to common sense that this respondent would not have left her husband to lead a life of grass-widower and the child

would not also be expressing a determined preference only to live with the mother. The girl though she is delicate looking and appears much

younger than her age, is neatly dressed and appears to be well brought up reflecting credit upon the mother. Therefore, On the question of

character and capacity of the proposed guardian the father's claim is certainly inferior to that of the mother.

12. The aforesaid discussion answers the consideration relating to the existing or previous relations of the father with the minor girl. The father who

has not behaved well towards the wife and the child and has killed all their affection for him, is found to have filed this petition "mala fide" for no

other purpose than to harass the wife who is refusing to live with him unless he lives separately with her and the daughter away from the mother-in-

law and for which purpose an adjournment was given by me on the off chance that the husband and wife might come together & which proved

futile he-cause the husband persists in living with his mother which would naturally promote only what has been happening before and brought

about separation. This mala fide application has been filed more or less as a

counterblast to the petition u/s 488, Criminal P. C., and deserves no

encouragement: -- "Subhadra Koer v. Dhajadhari Gossain", 16 CWN 444 (U), 15 CWN 457 (I); -- "Mt. Sudhia v. Makka", AIR 1919 All 49

(V); -- "Mt. Mokabar v. Karim Baksh", AIR 1923 Lah 283 (W).

13. Minor's preference: Where the minor is old enough, to make an intelligent preference, the wishes of the minor should be considered by the

Court. No doubt, this is not conclusive on the matter but is a matter to be taken into account in arriving at the conclusion. But any preference

expressed by the minor should not be considered unless it is also intelligent: -- "Mrs. Annie Besant v. Narayaniah", AIR 1914 PC 41 (X); --

Mohideen Ibrahim v. Mahomed Ibrahim", AIR 1917 Mad 612 (Y); -- Konthalathammal Vs. Thangaswami Pillai and Others, ; --"Rearle v.

Krishna", 9 Mad 391 (Z1); -- "Sheo Shankar v. Khupchand", AIR 1925 Nag 233 (Z2); -- In the Matter of Lovejoy Patell and Another, ". In this

case the wishes of the minor were expressed by one who impressed me as being old enough to make an intelligent preference and the preference

expressed by the minor also impressed me as intelligent.

14. Therefore, all these considerations are against transferring the custody of the minor to the father and I have already pointed out how the

interests of the minor are paramount and the fact that the father is the natural guardian would not "ipso facto" entitle him to custody. In fact there is

often much confusion in regard to Clause (b) of Section 19 of the Act, which states that ""nothing in this chapter shall authorise the 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"". But all that Clause (b) means is that the court cannot appoint a father as guardian under the Guardians and Wards Act. He is the

natural lawful guardian of his own minor children. But if the father makes an application for guardianship for the purpose of obtaining the custody of

the child from another the application will be treated as one u/s 25 of the Act. The remedy for the father to obtain the custody of the children is an

application u/s 25 of the Act and when the father makes an application u/s 25, the welfare of the minor is the paramount consideration for deciding

the custody and the judicial considerations which ought to weigh with a Court in deciding u/s 25 have been indicated above.

15. Bearing these principles in mind if we examine the facts of this case, we find that it is not for the welfare of the minor to transfer her custody to the father.

16. This petition is dismissed.