

V. Ramesan for the appellant.

The Honourable Mr. B. N. Sarma for the respondent.

The following judgment of the Court was delivered by SPENCER, J:—A preliminary objection has been taken that no appeal lies, as an order under section 488, Criminal Procedure Code, awarding maintenance is an order passed in a criminal trial. We think the objection is good. Clause (7) describes the person against whom proceedings are taken as an “accused” and provides that he may give evidence on his own behalf, a right which would exist without being conferred by statute if the proceedings were civil.

Clause (6) provides that the evidence shall be recorded in the manner prescribed for the trial of summons cases and clause (3) provides that a person neglecting to comply with the order may be imprisoned.

The Bombay High Court in *Reg v. Thaku bin Ira*(1) took the view that the proceedings were, under the Code of Criminal Procedure then in force, a “judicial proceeding of a criminal Court” from which no appeal lay. We agree with that decision and dismiss this appeal with costs.

K.R.

APPADU
2.
APPANMA

SPENCER
AND GOUDS
TROTTER, JJ.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

AUDIAPPA PILLAI (PETITIONER), APPELLANT,

v.

NALLENDRANI PILLAI (RESPONDENT), RESPONDENT.*

Guardians and Wards Act (VIII of 1893), ss. 17 and 19—Guardianship of minor children—Father, marrying a second time—No disability.

Under section 19 of the Guardians and Wards Act, the Court must be satisfied that the husband or father is unfit to be the guardian of his wife or child respectively before it can appoint another person as guardian. The fact of the father marrying a second time is no ground for depriving him of the guardianship of his minor children.

Bindo v. Sham Lal (1907) I.L.R., 29 All., 210, dissented from.

1915.
March 5

2871. L. J
442

(1) (1868) 5 Bom. H.C.R., 81 (Cr. Ca.).

* Appeal Against Order No. 76 of 1914.

AUDIAPPA
v.
NALLEND-
DRANI.

APPEAL against the order of H. O. D. HARDING, the District Judge of Trichinopoly, in Original Petition No. 296 of 1913.

The material facts of this case appear from the judgment.

T. R. Krishnaswami Ayyar for *T. R. Ramachandra Ayyar* for the appellant.—I rely on section 17 of the Guardians and Wards Act. The Court will have regard to the welfare of the minor. [NAPIER, J.—What section refers to the case of a father?] Section 19 (b) refers to the father. [NAPIER, J.—How is the father unfit?] *Bindo v. Sham Lal*(1) supports my position. [SESHAGIRI AYYAR, J.—On the facts of that case, the Court found the father unfit.] [NAPIER, J.—In that case there is no reference to the section by the Judges.] The step-motherly treatment is enough to put the father out. [NAPIER, J.—The question is:—Is the father unfit?] Section 17 must be considered. [SESHAGIRI AYYAR, J.—Section 17 is subject to section 19.] *Bindo v. Sham Lal*(1) is followed by the Bombay High Court. See *Re Gulbai and Lalbai*(2). [SESHAGIRI AYYAR, J.—This is not the case of the father.] I request special attention to the concluding portion of the section 17, namely, “who have lost their natural guardians.” [NAPIER, J.—This is not a case where the minors have lost their natural guardian.] [SESHAGIRI AYYAR, J.—In none of these cases section 19 was considered.] [NAPIER, J.—Section 19 excludes the whole chapter when the father is fit.] [SESHAGIRI AYYAR, J.—You must satisfy us that in this case the father is unfit and then only other considerations would arise. Unless you show evidence of cruelty, you have no case.] I refer to the deposition of the petitioner as to cruelty of the father. [SESHAGIRI AYYAR, J.—Where is anything in this man’s deposition to find that the father is unfit?] The father is entitled to their property after them. That is a disqualifying circumstance. [SESHAGIRI AYYAR, J.—A man being a next heir to property is a disqualification under Roman Law, but not under Hindu Law.]

S. Varadachariyar for the respondent was not called upon.

SESHAGIRI
AYYAR
AND
NAPIER, JJ.

The following JUDGMENT of the Court was delivered by SESHAGIRI AYYAR, J.—The District Judge held that no circumstances have been proved which would deprive the father of the right of guardianship of his minor daughters. We agree with

(1) (1907) I.L.R., 29 All., 210.

(2) (1908) I.L.R. 22 Bom., 50 at p., 54.

him. Mr. Krishnaswami Ayyar has taken us through the whole of the evidence. Accepting in their entirety the depositions of appellants' witnesses, we are unable to find that any circumstance has been spoken to which would render the father unfit to be the guardian of his minor daughters. There is some evidence that the deceased mother of the girls was not properly treated: that is not a ground for presuming that the children will not be properly looked after. The eldest girl was twelve years of age at the time of the enquiry and the grandfather is unable to depose to any single act which shows that either the father or the step-mother ill-treated the girl. The fact that the father has married a second wife is not a sufficient ground for holding that he is unfit to be the guardian of his children.

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—
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AYYAR
AND
NAPIER, J.J.

The learned vakil for the appellant relies on *Bindo v. Sham Lal*(1), which seems to lay down that if the father marries again, he ought to be deprived of his legal right of guardianship. The learned Judges refer only to section 17 and say that the welfare of the girls is the primary consideration. There is no doubt that that would be the consideration which would influence the Court ultimately; at the same time, it ought not to be forgotten that the legislature advisedly draws a distinction between the legal rights of husband and parents on the one side and those of the other near relations on the other. In the first class of cases, it must be established that any act or conduct of the husband or father renders him unfit for guardianship: the fact that the child may be happier and more comfortable with other relations is not sufficient to deprive the two relations referred to of their right and duty. The same sanctity does not attach to the rights claimed by the other relations. It is for these reasons that section 19 of the Guardians and Wards Act lays down that the Court must be satisfied that the husband or the father is unfit to be the guardian of his wife or child respectively before it can appoint another person as the guardian. For these reasons we are unable to follow the decision in *Bindo v. Sham Lal*(1). The decision in *Be Gulbai and Lalbai*(2) deals with the guardianship of other near relations. To such cases section 19 does not apply and the only consideration which

(1) (1907) I.L.R., 29 All., 210. (2) (1908) I.L.R., 82 Bom., 50.

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AND
NAPIER, JJ.

should weigh with Courts is the welfare of the minor; we think the order of the District Judge is right; we must dismiss this appeal. Having regard to the fact that the grandfather is deeply interested in the minors, we think the provision for consulting the Court before giving the girls in marriage is a salutary one. We see no reason to think that the security is not sufficient. We make no order as to costs.

S.V.

APPELLATE CIVIL.

*Before Mr. Justice Seshagiri Ayyar and Mr. Justice
Kumaraswami Sastriyar.*

1915.
March 9.

G. PERIAH *alias* ETHIRAJAYYA (PETITIONER), APPELLANT,

v.

287.L.J.44

G. LAKSHMIDEVAMMA AND FOUR OTHERS (RESPONDENTS),
RESPONDENTS.*

Costs—Order of Appellate Court remanding a case—“Costs to abide the result,” meaning of—Discretion of lower Court, if fettered—Costs to abide and follow the result and costs to follow the event, distinction between.

Where the High Court, in remanding a case to the lower Court, ordered that the costs should abide the result,

Held, that the words “abide the result” only connote that the order as to costs is to await the passing of the final decision in the case, and have not the effect of fettering the discretion of the trying Judge.

Distinction between “abide the result” and “abide and follow the result” or “follow the event” pointed out.

APPEAL under article 15 of the Letters Patent against the judgment of TYABJI, J., in *Periah v. Lakshmiddevamma*(1).

The material facts appear from the judgment.

* Letters Patent Appeal No. 234 of 1914.

(1) (1914) 11.L.R., 39 Mad., 473 (footnote).

CIVIL REVISION PETITION No. 348 of 1913.

Before Mr. Justice Tyabji.

G. PERIAH (PETITIONER), PETITIONER,

v.

G. LAKSHMIDEVAMMA AND FOUR OTHERS (RESPONDENTS),
RESPONDENTS.*

1914.
March 20.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) praying the High Court to revise the order of the District Judge of Guntur, in Original Petition No. 961 of 1910.