Appellate Jurisdiction(a)

Civil Miscellaneous Regular Appeal No. 406 *of* 1872.

THATHU BAPUTTY.....*Appellant.*

CHAKAYATH CHATHU.....*Respondent.*

The Civil Judge removed two children, governed by the rule of Márumakatáyam, from the custody of their Karnavan, and placed them under the guardianship of their father. *Held*, by the High Court, on appeal, that the order should be reversed on the grounds that no case had arisen for the exercise of the Civil Judge's power, and that the order was wholly opposed to the very principle upon which Márumakatayam depends.

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THIS was an appeal against the order of J. W. Reid, the Civil Judge of Tellicherry, dated the 11th September 1872, passed on Miscellaneous Petitions Nos. 303 and 359 of 1872.

Miscellaneous Petition No. 303 of 1872 was presented on behalf of Chakayath Chathu praying, under Act IX of 1861, that the two minors, children of petitioner by his deceased wife Cháyichi, may be ordered to be restored to petitioner by the counter-petitioners, who, he alleged, had forcibly taken possession of them.

Counter-Petition No. 359 of 1872 was presented by Thatha Unni, one of the two counter-petitioners.

Upon reading these petitions and hearing the evidence adduced and the arguments of the vakíls on behalf of the several parties, the Civil Judge made the following order:—

"The question to be decided is who is entitled to take charge of the children of a deceased woman who followed the rule of nephews. The criminal law requires the father of a child unable to maintain itself to maintain it (Section 316, Criminal Procedure Code) and the natural equity found in most positive law entitles a father to be the guardian of his children, and enforces the burden of maintaining them on the father:

Does the rule of nephews form any exception to this general rule?

I know of no direct precedent, unless it be a dictum of the High Court in 4, M. H. C. R., 203, where in *Subba Hegade*

(a) Present: Morgan, C. J., and Holloway, J.

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v. *Tongu* (a case affected by the kindred system of A'lyasantána) the High Court observed—"It does not follow, as the Civil Judge remarks in his judgment, that a husband is not bound to afford necessary maintenance to the woman from his self-acquired means, so long as she continues to live with him as his wife. It will, probably, be found that the general law does impose such an obligation, but, even supposing it does not, still, his non-liability to support her could not in any way alter the legal effect of the wife's residence with him, or her right to maintenance out of the property of her family."

There is some analogy between these cases—but the chief value of the case is as showing the extent to which the kindred systems of A'lyasantána and Márumakatáyam affect the relations of those living under it. The fact that a wife lived with her husband, and could, while doing so, look to her husband for maintenance, was held in no way to alter the effect of the A lyasantána rules as to the right of one voluntarily separating from the family to claim maintenance.

In a similar way, I think, from recorded cases is to be gathered that the rule of nephews simply confers on the members a right to maintenance in the family house, but not out of it. I do not see it gives a right to the Karnavan to force the adult members to live in the family house, though, if they come to it, it binds him to maintain them, and I see no difference in the matter of minors, if they wish to go from under the tarwád roof. I think they may, and in the same way I see nothing to take away from the father the natural right, which, in absence of any rule of the common law of the country, he must be supposed to have, of taking care of, and enjoying the society of his own children.

I therefore order the Karnavan of the children, Petitioner in No. 359, to deliver the children to the Petitioner in No. 303, their natural father. Each party will bear their own costs.

Against this order, the counter-petitioner Thathu Baputty appealed to the High Court on the ground that—

By the law applicable to the case the appellant was entitled to the custody and possession of the children.

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Shephard, for the appellant.

Ormsby, for the respondent.

The Court delivered the following

JUDGMENT:—In this case the Civil Judge has removed two children, governed by the rule of Márumakatáyam, from the custody of their Karnavan, and placed them under the guardianship of their father.

He has done this, he says, upon principles of natural equity to be found in other systems of positive law. In all systems of positive law, the pre-supposition to the exercise by the State, acting through the Courts, of the power of appointing a guardian is that there shall be no guardian existing by the provisions of the law itself ("Tutela legitima" or "testamentaria") "quia tutorem habenti tutor dari non potest."

In the present case, by the principles of the law of Malabar, the mother herself while alive and her children too were under the guardianship of the head of the family—the Karnavan. Their position was precisely analogous to that of the members of a Roman family under the patria potestas. The Karnavan is as much the guardian and representative, for all purposes of property, of every member within the tarwad as the Roman father or grandfather.

Moreover, the relation of husband and wife does not, in Malabar, disturb this condition. These children have no claim whatever upon the property of their father, but their rights are entirely in that of their Karnavan's family. There is no doubt at all that he was, during the mother's lifetime, and continues to be, after her death, the legitimate guardian of these children, and that the father has by positive law not the smallest right to their custody. On the grounds that no case had arisen for the exercise of the Civil Judge's power, and that the order is wholly opposed to the very principle upon which Márumakatáyam depends, we reverse the order with costs.

Order reversed.