

July 17, 1911

Present : Lascelles C.J. and Middleton J.

KANAPATHIPILLAI v. SIVAKOLUNTHU.

213—D. C. Jaffna, 199.

Tesawalamai—*Father marrying a second time—Maternal relations of children entitled to the custody of the children and control of the property.*

“ If a father wishes to marry a second time, the mother-in-law or nearest relation generally takes the child or children (if they be still young) in order to bring them up, and in such case the father is obliged to give at the same time with his child or children the whole of the property brought in marriage by his deceased wife, and the half of the property acquired during his first marriage.”

This passage of the *Tesawalamai* is not obsolete. The discretion of the Courts to have regard to the best interests of the child is not entirely excluded, but the Courts should not depart from the general principle laid down in the passage cited without some substantial reason for so doing.

THE facts are set out in the judgment.

Tambyah, for appellant.

Sampayo, K.C. (with him *Tissaveerasinghe*), for the respondent.

Cur. adv. vult.

July 17, 1911. LASCELLES C.J.—

In this case the question is whether the father, who is married a second time, is entitled to the care of the person and property of his child by his first wife, or whether the maternal grandmother of the child is entitled to be appointed guardian and curator. It appears that the minor is entitled to property worth Rs. 1,500, consisting of a land and a house, and it also appears that this was property devolving on the minor from his mother. The question at issue turns on the construction of paragraph 11 of the *Tesawalamai*. The material words are as follows : “ If the mother dies first, leaving a child or children, the father remains in the full possession of the estate so long as he does not marry again, and does with his child or children and with his estate in like manner as is above stated with respect to the mother. If a father wishes to marry a second time, the mother-in-law or nearest relation generally

takes the child or children (if they be still young) in order to bring them up, and in such case the father is obliged to give at the same time with his child or children the whole of the property brought in marriage by his deceased wife, and the half of the property acquired during his first marriage." It has been suggested in argument that this part of the *Tesawalamai* is obsolete ; but I am unable to agree with this view. We have been referred to no enactment which either expressly or by necessary implication repeals this part of the *Tesawalamai*. It is also said that section 11 is a portion of that part of the *Tesawalamai* which deals with inheritance, and it is only incidentally that it refers to the case of guardianship and curatorship. This is true ; but at the same time the passage which I have cited does contain a distinct statement of the customary law of the Tamils as regards the rights of the maternal relations of the child with regard to the person and property of the child when the father is married a second time. I agree that there is nothing in the words of the enactment which makes it in all cases imperative on the Courts to entrust the guardianship to the maternal relations, and that the discretion of the Courts to have regard to the best interests of the child is not entirely excluded. But I think that it is necessary, in order to give effect to the intention of this provision, that the Courts should not depart from the general principle there laid down without some substantial reason for so doing.

Thus, the question which we have to consider in this case is whether the District Judge had sufficient grounds for ignoring the rule of the *Tesawalamai* and decreeing the guardianship to the father of the child. Now, in the affidavit of the father there are grave allegations against the character of the grandmother, and if these allegations were true, it would be within the power, and I think it would be the duty of the District Judge, to withhold the guardianship from her. These allegations are, however, denied by the respondent, and the District Judge does not seem to have inquired into their substance. His order seems to be entirely based on the consideration that the father is a better educated and more intelligent person than the grandmother. This I think is not a sufficient ground for departing from the rule, and I think that the proper course will be to set aside the order of the District Judge, and to remit the case for a further inquiry into the allegations made against the character of the respondent, and to make order in accordance with the principles which I have endeavoured to indicate. I think that the appellant is entitled to the costs of the appeal, and that the costs of the past and further inquiry must abide the result of the inquiry.

MIDDLETON J.—I agree, and have nothing to add.

July 17, 1911

LASCHELLES
C.J.

Kanapathipillai v. Sivakolunthu

Sent back.