

Present: Pereira J.

1914.

## THEVANAPILLAI v. PONNIAH.

631—P. C. Jaffna, 12,634.

*Maintenance—Tesawalamai—Grandmother or other relation taking over the child on second marriage of father—Claim for maintenance from father.*

The *Tesawalamai* recognizes the grandmother or other relation of a child, who, in terms of paragraph 11, section 1, of the *Tesawalamai*, takes over the child on a second marriage of the father as a suitable guardian. She may therefore be allowed to keep the child as against the father, in case the latter happen to be a person unfit to be entrusted with the child. In that case the father would be liable to make full provision for the maintenance of the child while it remains in the custody of the grandmother or other relation.

IN this case the applicant, the grandmother of certain minor children who were in her custody, applied for their maintenance against the respondent, the father, who had married a second time. The respondent undertook to maintain them on condition they were delivered into his custody. The applicant contended that under the *Tesawalamai* she was entitled to the custody of the children, and she also alleged that the father ill-treated the children. The learned Police Magistrate, following the decision in *Meenatchi v. Supramaniam Chetty*,<sup>1</sup> held that the grandmother could not claim the custody of the children where the father undertook to bring them up, and dismissed the application without going into the allegation of ill-treatment. In appeal this order was set aside, and the case was sent back for inquiry on the allegation of cruelty. On fresh evidence, the Police Magistrate held that the evidence of ill-treatment was not sufficient to prove that the respondent was unfit to bring up the children, and he again dismissed the application. The applicant again appealed.

*J. Joseph*, for appellant.—The father cannot claim the custody of the children. The parties are Jaffna Tamils, and they are bound by the *Tesawalamai*. Under that law on the marriage of the father a second time he must deliver the children to their grandmother, and must provide for their maintenance. *Kanapathipillai v. Sivakolunthu*.<sup>2</sup> The case of *Meenatchi v. Supramaniam Chetty*,<sup>1</sup> on which the learned Police Magistrate relies, has no application here. Here we are bound by the special provisions of the *Tesawalamai*,

<sup>1</sup> (1898) 3 N. L. R. 181.<sup>2</sup> (1911) 14 N. L. R. 484.

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and the Maintenance Ordinance cannot over-ride this special law. There is strong evidence of ill-treatment of the children by their father. By his behaviour he has shown himself to be unfit to bring them up.

*Arulanandam*, for respondent.—If the grandmother is entitled to the custody of the grandchildren, she cannot claim any separate maintenance for them from their father. What the *Tesawalamai* says is that the father should deliver the children to the grandmother, and should give at the same time the whole of the property brought in marriage by his deceased wife and the half of the property acquired during the first marriage. The grandmother should maintain the children out of the property so delivered to her. She cannot claim anything more for their maintenance. If she cannot maintain them out of that property, she must return them to the father. The Maintenance Ordinance applies to all classes of persons in the Island, and the *Tesawalamai*, which applies to one class of people only, cannot affect the operation of the Ordinance. The respondent had not a chance of disproving the allegation of ill-treatment brought against him. The Police Magistrate has not called upon him for his defence, and he must be allowed an opportunity of calling evidence in rebuttal.

*Cur. adv. vult.*

July 31, 1914. PEREIRA J.—

In this case the appellant's counsel has reverted to the old argument in the Court below that under the *Tesawalamai* the applicant was entitled to the custody of the children of the respondent, and that therefore the applicant was entitled to recover maintenance from the respondent. The provision of the *Tesawalamai* relied on is a provision that had long been supposed to be obsolete, but which appears to have been re-animated by the judgment of this Court in the case of *Kanapathipillai v. Sivakolunthu*.<sup>1</sup> The provision in its entirety is as follows: "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 the first marriage." The terms in which this provision is expressed appear to me to indicate that it was a mere custom regulated in each individual case more or less by arrangement between the parties. Anyway, the grandmother is said to take the children over "to bring them up," and for that purpose she is to get all the property mentioned above. I do not think that it was ever intended that she should be entitled to look to the father for the maintenance of the children. If she cannot maintain the children, she should return

<sup>1</sup> (1911) 14 N. L. R. 484.

them and the property to the father. At the same time it is clear that the Tamil law recognizes the grandmother or the other relation who takes over the children on a second marriage of the father as a suitable guardian, and I think she may well be allowed to keep the children as against the father, in case the father happen to be a person not fit to be entrusted with the children, and in that case the father would be liable to make full provision for the maintenance of the children while they remain in the custody of the grandmother or other relation.

On the last appeal in this case I held that the question arising here is whether the applicant could make good her allegation of cruelty against the respondent. On that question evidence has since been called, and to my mind the appellant has fully established her allegation of cruelty. The evidence does not appear to have been disbelieved by the Magistrate, and if it is true that the boy Kanagasabai, at the age of six or seven years, was beaten as described by himself and the other witnesses and put out of the house, with the result that the child had to seek shelter in the house of the next door neighbour, and he remained there a month, the respondent, to my mind, has shown himself to be an utterly unfit person to be allowed charged of his children. The respondent's counsel has urged that the respondent was not called upon for his evidence in the Court below. That was probably so, and I would give him an opportunity of adducing his evidence.

I set aside the order appealed from and remit the case to the Court below to enable the respondent to adduce his evidence. If the facts sworn to by the applicant's witnesses are not effectually disproved by the respondent, the Magistrate will make a suitable order for maintenance, taking into account, of course, the income of the property taken over by the applicant with the children. If, on the other hand, the facts referred to above are effectually disproved in the opinion of the Magistrate, he will of course make order accordingly.

*Set aside and sent back.*

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