

**Munnibai Vs. Dhanush**

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**Court :** Mumbai

**Decided On :** Jul-08-1958

**Reported in :** AIR1959Bom243; (1958)60BOMLR1351; ILR1959Bom545

**Judge :** B.N. Gokhale, J.

**Acts :** [Guardians and Wards Act, 1890](#) - Sections 25; [Hindu Minority and Guardianship Act, 1956](#) - Sections 6

**Appeal No. :** Misc. (F) No. 68 of 1956

**Appellant :** Munnibai

**Respondent :** Dhanush

**Advocate for Pet/Ap. :** C.S. Dharmadhikari, Adv.

**Disposition :** Appeal allowed

**Judgement :**

1. This appeal arises out of the proceedings started by the present appellant under the Guardians and Wards Act (VIII of 1890) for being appointed as the guardian of her minor daughter Benibai, and for getting custody of the child. The appellant and the respondent were married before 1952 and the minor Benibai was born to them on 26th September 1952. It seems that disagreement arose between the married couple and it would appear that a criminal case was filed against the husband.

ultimately there was a compromise and on 27th April 1955 there was an agreement between the parties granting divorce to the wife according to caste custom and a term of that compromise appears to be that the appellant was to hand over the custody of her daughter to the respondent Dhanush, her husband and accordingly the respondent got the custody of the child. Soon after this divorce, it appears that the respondent married again and on 27th June 1955, the present application was filed by the appellant for appointment of herself as the guardian of the minor daughter and for getting custody of the child. The principal ground on which the application was made was that the child was of a very tender age and wanted the mother's affection and rearing, and since the respondent had married again, there was every likelihood of the child being ill-treated by the husband and the step-mother. The application was resisted by the husband who set out in the written statement the circumstances under which the divorce came to be effected, and it is admitted that he was not prepared to give the wife divorce unless his daughter was given to him. He denied that the minor was being ill-treated or was likely to be ill-treated and he stated that she was being brought up with the greatest care, love and affection and he affirmed that the general state of the minor had improved. He stated that the apprehensions of the applicant that the minor was likely to be neglected were imaginary and baseless. He also stated that the applicant was dependent on her father and was likely to marry again in the near future, and therefore, it was desirable that the minor should remain with the non-applicant, he being her natural guardian. He denied that there was any pressure on the applicant when she handed over the custody of the child to him. He, therefore, prayed that the application should be dismissed with costs. The trial Court came to the conclusion that it was not in the interest of the minor to appoint the applicant as guardian of the person of the minor, because it held that the husband was not unfit to act as the guardian of the minor. The trial Court came to the conclusion that the non-applicant had married another wife, but that was no ground that Benibai would be neglected. The trial Court also relied upon the fact that the husband demanded back the minor when giving divorce which, according to it, showed his love for the child. On these grounds, the application of the appellant was dismissed.

2. Now, in this appeal Mr. C. S. Dharmadhikari, the learned counsel appearing on behalf of the appellant has taken me through the relevant record of the case, since unfortunately the respondent is not represented by any counsel. Mr. Dharmadhikari contends that the learned Judge has taken a very narrow view of the evidence and has refused to accede to the request of the appellant for being given the custody of her child on the ground that the natural guardian, the father, was not an unfit person to act as the guardian, and Mr. Dharmadhikari naturally contends that (sic) not the proper test in considering applies (sic) under the Guardians and Wards Act (sic) Law, the father would be (sic) but in considering the (sic) father should have the custody of the child or the mother when the two are separated, the Court has to consider primarily the interests of the minor and in arriving at a decision the Court has to take into consideration all the circumstances of the case, and the circumstance that the father has married again would, in my opinion, be a relevant circumstance which must be given its due weight by the Court. It is true that when the parties separated by mutual agreement according to caste custom on 27th April 1955, the applicant consented to the custody of the child being taken by the father. But the applicant has stated in her evidence that she was very unhappy at her husband's place and as the husband would only grant her divorce in case she gave up her claim to the daughter, in order to relieve herself from her unhappiness, she gave her daughter to the husband and took the divorce. She further stated that as her daughter was of a very tender age, she would be able to bring her up better and her parents would help her in doing so, and her evidence indicates that as the respondent has remarried, the minor daughter would be brought up in a better atmosphere if the mother got the custody of the child. The appellant also categorically stated that she did not wish to remarry. The appellant was examined in Court on 3rd December 1955 and stated that after she gave her daughter to the husband, she had no occasion to see her till the day she gave evidence. The appellant's father, who appears to be the proprietor of a motor repairs workshop at Drug stated that the minor was handed over to the husband because the latter agreed to give divorce on condition that the girl Banibai was given to him. The respondent also admitted that he agreed to give divorce provided the appellant gave up the custody of the child. According to him in his house there are his mother, father, three brothers, two sisters and the

second wife he married. His youngest brother appears to be aged 2 1/2 years. he stated that Benibai was being reared up and looked after by himself and his second wife. He also asserted that the condition of Benibai was far better than what it was when she was brought from the mother. On the evidence, the learned trial Judge, as I have already stated, came to the conclusion that the respondent was not an unfit person to be the guardian of the child. But unfortunately he did not give proper weight to the circumstance that the husband has taken a second wife.

3. In *Bai Tara v. Mohanlal Lallubhai*, 24 Bom LR 779 : AIR 1922 Bom 405 the father applied for getting the custody of his minor son from his wife who had been living separate from him and had the custody of the boy. The father had married again and the boy was seven years old at the time when the father made the application. This Court taking into consideration the fact that the father had married again, came to the conclusion that the seven-year-old boy would be much better off living with his mother than with his father. It was further observed, that 'the step-mother cannot be expected to be very much interested in his welfare, and the uncles and any members of the prior generation who may be living in the house will also not be likely to give this small boy the attention and sympathy which he naturally requires.' In the present case also, according to the husband's deposition, though his father and mother are living separately from him, all the members of the family are living in one house and his youngest brother was aged 2 1/2 years only. In my view, in a large family like that of the respondent, the bringing up of Benibai is not likely to be well looked after, especially now that the husband has taken a second wife.

4. In *Sarawatibai Shripad v. Shripad VasANJI*, : AIR1941 Bom103 , it was held that in the matter of the custody of a minor child, the paramount consideration is the interest of the child rather than the rights of the parents and in the case of a minor child of tender years, the proper person to whom the custody of the child should be given is the natural mother and she should be preferred to the father, as it is impossible to find any adequate substitute for the love and care of the natural mother. It was observed by Sir John Beaumont in that case that the natural mother was the proper person to have the custody of the child, and there was no evidence before the Court to justify the conclusion that she was not a proper person to have

that custody though the evidence in that case showed that the mother had recovered from tuberculosis. In this case also it is not suggested that the mother would be unable to take care of the daughter in case she was handed over to the applicant. The apprehension expressed in the written statement was that the mother was likely to re-marry. But as I have already pointed out, the mother has categorically stated on oath that she has no wish to re-marry.

5. In *Kalippa v. Valliammal*, AIR 1949 Mad 608, it was held that even if under the Hindu law, the father is the natural guardian of his child, and is preferred to his mother, yet, in proper cases, the mother can be appointed its guardian, and the Court in that case appointed the mother as the guardian of her daughter who was about 2 1/2 years old and was given custody of the girl till she attained the age of 18 years, as the father had married a second time. In doing so, the Madras High Court followed the Bombay case of 43 Bom LR 79: : AIR1941 Bom103 .

6. Under the Hindu Minority and Guardianship Act (XXXII of 1956), which came into force on 25th August 1956, it is provided under section 6(a) that the natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property, would be the father in the case of a boy or an unmarried girl, and after him, the mother; but the proviso says that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Now, this Act came into force after the decision of the trial Court on 9th December 1955. But the proviso to Section 6(a) of the Act shows that even Parliament took the view that though in the case of an unmarried girl, the natural guardian would be the father, and after him, the mother, the custody of a child of tender years before the completion of the age of five should ordinarily be with the mother. But that, in my judgment, would not fetter the discretion of the Court, in proper cases to direct the restoration of the custody of a child even after completion of five years to his mother without interfering with the position of the father as the natural guardian as was done in the case of : AIR1941 Bom103 . In this case the minor was about 2 years of age. In the present case the child Benibai, was born on 26th September, 1952 and she has not yet completed six years of age. In 24 Bom LR 779 : AIR 1922 Bom 405 this Court was concerned with the question of the custody of a boy of 7 years and retained the custody with the mother.

7. As the appellant has stated on oath that she has no desire to re-marry and as she is anxious to have the custody of her minor daughter in order to bring her up in the proper atmosphere, and as the father has married, in my judgment, the proper thing to do would be partly to grant the application of the appellant and direct that the respondent should hand over the custody of minor Benibai to the appellant. This direction will, however, be subject to the father's right to visit his daughter at the appellant's residence, whenever he wishes to do so, and will not also prejudice his right to make any application at a future date in case of change of circumstances if he wishes to get back the custody of his daughter in the interest of her welfare. As the appellant, the mother, now resides in Madhya Pradesh at Durg, she must give security of the value of Rs. 500/- to the satisfaction of the trial Court before she gets the custody of minor Benibai for due performance of future orders.

8. The appeal will, therefore, be allowed, the application of the appellant will be granted partly and the respondent will be directed to hand over the minor, Benibai, to the custody of the applicant Munnibai subject to the directions given above. In the circumstances of this case, there will be no order as to costs throughout.

9. Appeal allowed.

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