APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

MONIJAN BIBI

v.

DISTRICT JUDGE, BIRBHUM.*

1914.

May 15

Mahomedan Law—Marriage—Minor—Guardian for marriage, functions and position of—Marriage of minor ward, necessity of consent of Court for—Functions of Court in such cases—Procedure to be followed by the guardian for marriage of Mahomedan infant—Guardians and Wards Act (VIII of 1890) ss. 4(2), 24, 25, 26, 41, sub-s. (1) cl. (d), 42 sub-s. (1), 47 cl. (a)—Practice—Order of District Judge not appealable.

In the case of Mahomedans, the words "disposal in marriage" cannot be treated as included in the general words "such other matters as the law to which the ward is subject, requires" occurring in s. 24 of the Guardians and Wards Act.

In the absence of express statutory provision to this effect, it cannot reasonably be held that the Mahomedan law on the subject of guardianship in marriage has been abrogated by implication by s. 24 of the Guardians and Wards Act

Where the District Judge of Birbhum, in the matter of the disposal in marriage of a Mahomedan female minor in respect of whose person and property guardians had been appointed by him, proceeded to select a suitable husband for the minor from the preliminary list of possible candidates prepared by his Hindu Nazir (the guardian of the property), in opposition to the selection of the guardian of the person (her mother), and of the guardian for marriage (her father's step-brother), both of whom had initiated these proceedings:

Held, that the proceedings before the District Judge had been throughout irregular.

* Appeal from Original Order, No. 74 of 1913, and, in the alterpative, Civil Rule No. 221 of 1913, against the order of B. C. Mitter, District Judge of Birbhum, dated Dec. 6, 1912.

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It was not the function of the District Judge to act as match-maker. But a ward of Court could not marry without the consent of the Court.

Eyre v. *Shaftesbury* (1), *Jeffrys* v. *Vanteswarstwarth*(2), *Tombes* v. *Elers* (3), *Subhadra Koer* v. *Dhajadhari Goswami* (4) followed.

Bai Diwali v. *Moti Karson* (5) disapproved.

Held, further (after laying down the proper procedure to be followed in cases of this description), that the choice had to be made in the first instance by the guardian for marriage, and if on the materials before the District Judge he was satisfied that the marriage was not unsuitable, he was to sanction it.

Held, also, that the order of the District Judge was not open to appeal, as s. 47 cl. (*a*) of the Guardians and Wards Act read with s. 43, sub-s. (*1*) and ss. 24, 25 and 26 did not cover the case.

APPEAL by Monijan Bibi and another and, in the alternative, Civil Rule on behalf of the said Monijan Bibi against the District Judge of Birbhum as the opposite party.

The material facts connected with this case are briefly as follows. By an order of the District Judge of Birbhum, dated 12th February 1910, one Monijan Bibi had been appointed guardian of the person of her minor daughter Asia Bibi, the Nazir, who was a Hindu, being appointed guardian of the property. On the 22nd May 1912, an application was made to Court by the mother and one Elat Mullick, a step-brother and nearest agnate of the said minor's father who claimed to be the guardian for marriage, for directions as to a suitable marriage of the infant. They had selected one Ishaq, and an objection was taken to him by the minor's father's cousin. The minor also approved of Ishaq before the District Judge. The Nazir, however, as ordered by the Court, submitted a report, after exhaustive enquiry, stating the qualifications of various eligible young men of the village who

(1) (1723) 2 P. Wms. 103, 112.
(2) (1740) Barn. Ch. 141, 144.
(3) (1747) 1 Dick. 88.
(4) (1911) 15 C. L. J. 147.
(5) (1896) I. L. R. 22 Bom. 509.

could be considered suitable. Ultimately the District Judge himself proceeded to select a suitable husband for the girl from the list prepared by the Nazir, and agreeing with the opinion of the minor's maternal grandfather, by his order, dated 6th December 1912, sanctioned Asia's marriage with one Belzar, the son of a respectable co-villager named Rahil, holding that Elat who claimed to be the minor's guardian for marriage had no *locus standi* in those proceedings. Being aggrieved by this order the said Monijan Bibi and Elat Mullick preferred an appeal to the High Court; and in the alternative Monijan Bibi filed a motion under s. 115 of the Code of Civil Procedure and obtained a Rule on the District Judge of Birbhum to show cause why the order complained of should not be set aside.

Babu Naresh Chandra Sinha, for the appellants and petitioner. Both the paternal uncle and mother of the minor agree that she should be married to a certain person. The District Judge had no jurisdiction to interfere with their discretion and to direct that the minor be married to some other person. Under the Mahomedan law, the paternal uncle and the mother are preferential guardians for marriage. The Kazi, whose functions are now exercised by the District Judge, is the guardian for marriage only when the uncle or the mother are dead: *vide* Ameer Ali's Mahomedan Law, Vol. II, pp. 280-282 (3rd edition); Shama Charan Sircar, Vol. I, p. 329; Tyabjee's Mahomedan Law, pp. 91, 92; Baillie's Digest pp. 45-46.

No one appeared for the opposite party.

Cur. adv. vult.

MOOKERJEE AND BEACHCROFT JJ. We are invited to set aside, in the exercise of our appellate or of our

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revisional jurisdiction, an order, which purports to have been made by the District Judge under the Guardians and Wards Act, for the marriage of a Mahomedan girl, in respect of whose person and property guardians had been previously appointed by him. On the 12th February 1910, the District Judge appointed the mother of the infant as guardian of her person and the Nazir of the Court as the guardian of her properties. The order, however, was not communicated to the Nazir, and he does not appear to have had any hand in the management of the estate, till quite recently, when the fact was discovered that the Nazir had never been apprised of his appointment. The proceeding now before us was initiated on the 22nd May 1912, when an application was made to the Court by the mother and by another person who claimed to be the half-brother of the father of the infant, for directions as to a suitable marriage of the girl. Objection was taken by a cousin of the father of the infant, who intimated to the Court that the selection of a bridegroom as made by the applicants was entirely unsuitable. The District Judge thereupon directed the attendance of all near relations of the girl, and also ordered the girl to be produced in Court if the mother had no objection. On a later date, the girl was brought before the Court; the District Judge then directed his Nazir, Babu Saradindu Chakravarti, a Hindu gentleman, to go to the village and after consultation with persons interested in the welfare of the minor, to submit a list of likely bridegrooms, stating their qualifications and position in society and making his recommendation with reasons. Objection was taken by the mother and the alleged uncle to the adoption of this course on the ground that it involved a supersession of the person entitled under the Mahomedan law to act as the guardian for marriage. No heed was paid to this, and

on the 16th August, the Nazir submitted his report. On the 27th September, the girl was produced again before the Court and she expressed her preference for a young man named Ishak. On the 4th October, the District Judge further considered the matter, and although he came to the conclusion that the Court could not undertake to perform the functions of a match-maker, he called upon the mother to nominate three of the young men mentioned in the report of the Nazir. On the 6th December, the District Judge recorded in the order sheet that the mother had failed to comply with the order of the 4th October, and he accordingly proceeded to select a suitable husband for the girl on the basis of the report submitted by the Nazir. This order is assailed before us as made without jurisdiction. In our opinion, the proceedings before the District Judge have been throughout irregular.

The Guardians and Wards Act does not make specific mention of the disposal in marriage of an infant in respect of whose person a guardian has been appointed by the Court, although section 41, sub-section (*1*), clause (*d*), provides that the powers of a guardian of the person cease in the case of a female ward by her marriage to a husband who is not unfit to be guardian of the person, or if the guardian was appointed or declared by the Court, by her marriage to a husband who is not in the opinion of the Court so unfit. The term "guardian" is defined in section 4, clause (*2*) to mean a person having the care of the person of a minor or of his property or of both his person and property. Section 24 then prescribes the duties of a guardian of the person in these terms: "A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which

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the ward is subject requires". It is remarkable that while the Legislature makes specific mention of support, health and education, no reference is made to the marriage of the minor. If we assume that the individual who has by law the right and duty of disposing of a boy or girl in marriage may be said to have for that limited purpose the care of his or her person, the question remains whether "disposal in marriage" can be treated as included in the general words, "such other matters as the law to which the ward is subject requires", which find a place in the concluding portion of section 24. The answer must plainly be in the negative in the case before us; we need not express any opinion as to what the answer may be in cases where the parties are not Mahomedans. In the first place, under the Mahomedan law, which applies to the parties before the Court, the guardian of the person of an infant is not necessarily the guardian for the marriage of the girl. In the second place, the Mahomedan law does not require that the guardian should provide suitable marriage for his ward, though it gives him the power to contract a marriage for the infant. The Mahomedan law does not impose upon guardians any religious obligation to provide suitable marriages for their wards; indeed, their power is so restricted that, where a minor has been given in marriage by a guardian other than the father or paternal grandfather, the minor has what is called the option of puberty, or option of repudiation, on attainment of age. We have, therefore, two fundamental positions under the Mahomedan law, namely, *first*, the right of giving a male or female minor in marriage falls upon a line of guardians different from that to which the management of his property is entrusted and also from that to which the custody of the person is confided; and, *secondly*, that although the intervention

of a guardian is an essential condition to the validity of the marriage of a minor, it is not obligatory upon the guardian of the person, nor even upon the guardian for marriage, to provide a suitable marriage for the ward [Macnaghten, Chapter VII, Articles 14, 16; Baillie, Book I, Chapter IV, page 45; Hamilton's Hedayah, Volume I, Book I, Chapter II, pages 36, 37 and 39; Ameer Ali, Volume II, pages 280—282 (third edition); Shama Charan Sircar, Volume I, page 329; Abdur Rahman, Articles 34—37 and 41 and 42; Abdur Rahim, page 331]. It cannot reasonably be held that the Mahomedan law, on the subject of guardianship in marriage, has been abrogated by implication by section 24 of the Guardians and Wards Act. One would have expected to find a specific statutory provision to this effect if the Legislature really intended to interfere with the rule of Mahomedan law which assigns the function of guardianship in marriage of an infant, under the name of *jabr*, to relatives who are not necessarily those entitled to the general care and direct custody (*hizanat*) of the person of the infant. The view we take is supported by the opinion of *Sir Roland Wilson* (*Anglo-Mahomedan Law*, Arts. 90 and 117).

The question next arises, What is the true function of the District Judge in the matter of the disposal in marriage of a Mahomedan minor in respect of whose person a guardian has been appointed by him? We are not prepared to accept the extreme view that the marriage of an infant, who is a ward of Court, may be allowed to take place without the sanction or even the knowledge of the District Judge, although such view appears to have been indicated in *Bai Diwali* v. *Moti Karson* (1). It would, we think, be

(1) (1896) I. L. R. 22 Bom. 509.

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contrary to first principles to hold that, although a minor is a ward of Court, an obviously unsuitable marriage may be arranged for her, while the Court is powerless to prevent what would manifestly be an irrevocable act permanently injurious to her best interests for life. If this view were not maintained, grave complications might also arise, because under section 41, sub-section (*1*), cl. (*d*), the powers of the guardian of the person cease, when such guardian has been appointed or declared by the Court, only when the marriage has taken place with a husband who is not, in the opinion of the Court, unfit to be guardian of the person of the girl. This clearly indicates the desirability, if not the absolute necessity, of the sanction of the Court, before the marriage is arranged and solemnised. We hold accordingly that a ward of Court cannot marry without the consent of the Court. This indeed has been recognised as an elementary principle in the law of England [*Eyre* v. *Shaftesbury* (1), *Jeffrys* v. *Vanteswarstwarth* (2), *Tombes* v. *Elers* (3)] and it has been repeatedly held that if a proposed marriage is unsuitable, the Court can, as representing the Sovereign in whom the guardianship of all infants is, in theory, vested, restrain the marriage, even though the guardian or the father has given his consent: *Gordon* v. *Irwin* (4), *Wellesley* v. *Beaufort* (5) affirmed by the House of Lords *Wellesley* v. *Wellesley* (6). This view was accepted as applicable to the case of a Hindu minor for whom a personal guardian has been appointed by the Court, in *Subhadra Koer* v. *Dhajadhari Goswami* (7), where it was ruled that marriage or connivance at marriage

(1) (1722) 2 P. Wms. 103, 112.
(2) (1740) Barn. Ch. 141, 144.
(3) (1747) 1 Dick. 88.
(4) (1781) 4 Brown.P. C. 355.
(5) (1827) 2 Russ. 1, 29.
(6) (1828) 2 Bligh N. S. 124; 1 Dow & Cl. N. S. 152.
(7) (1911) 15 C. L. J. 147.

with a ward of Court, without consent of the Court, is a contempt of Court liable to be severely punished.

The proper procedure to be followed in cases of this description may now be briefly described. The guardian for marriage of the infant, who may have negotiated for the marriage, must apply to the District Judge for his sanction. Notice of the application should be given to the infant, to the guardian of person if he happens to be different from the guardian for marriage, and also to such relations of the minor as the Judge may deem necessary. He will then consider the objections and suggestions, if any, and then determine whether the proposal of the guardian for marriage is for the true welfare of the minor or whether the marriage is unsuitable by reason of incongruity of age, inequality of rank and fortune or any like reason. If, on the materials before the District Judge, he is satisfied that the marriage is not unsuitable, he will sanction it.

The order of the District Judge in the case before us, tested in the light of the principles just explained, is clearly unsustainable. No doubt, at one stage of the proceedings he rightly took the view that it is not the function of the District Judge to act as a match-maker, but at a later stage he adopted measures quite contrary to the principle he had laid down. There was also a dispute before him as to who was entitled under the Mahomedan law to act as guardian for the marriage of the minor. This he did not decide as he should have done, but superseded both the claimants, appointed his Nazir to hold an enquiry in the village and to make a preliminary selection of possible bridegrooms, and finally called upon the mother to select three from amongst the persons named by the Nazir. When the mother, who was apparently treated as the guardian for marriage, could not make the

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selection, apparently for the reason that she did not consider any of the young men named by the Nazir quite suitable, the District Judge proceeded to make his own choice. This was clearly an irregular procedure. It is difficult to see why the choice should be restricted to young men of the particular village, and why the guardian for marriage should be limited to the preliminary list of possible candidates prepared by the Nazir. The choice has to be made in the first instance by the guardian for marriage, whoever he may be, and the true function of the District Judge is to test whether the selection made by the guardian for marriage is or is not suitable. The District Judge does not appear to have realised what responsibility would be involved, if he had, with or without the assistance of his Nazir, to select the most suitable bridegroom or bride, as the case might be, for every infant in the district in respect of whose person a guardian might have been appointed by him. Nor did the District Judge realise that, while under the Mahomedan law none but a Moslem can act as the guardian for marriage of a Mahomedan minor, the procedure he has followed has led to the supersession of such guardian by a Hindu gentleman, who *primâ facie* would not have an intimate knowledge of what would be deemed suitable in Mahomedan society.

The only other question which requires examination is whether the order of the District Judge is open to appeal. We are of opinion that section 47, cl. (*1*) of the Guardians and Wards Act, read with section 43, sub-section (*1*), and sections 24, 25 and 26, does not cover the case; consequently the order is not open to appeal and can be set aside only in the exercise of our revisional jurisdiction.

The result is that the appeal is dismissed but the Rule is made absolute, and the order of the District

Judge discharged. The records will be returned to him to enable him to take such further steps, if any, as the parties interested may desire him to adopt in accordance with the principles explained above.

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G. S. *Appeal dismissed: Rule absolute.*

APPELLATE CIVIL.

Before Fletcher and Richardson JJ.

ESAHAQ CHOWDHRY

v.

ABEDUNNESSA BIBI.*

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June 9.

Mahomedan Law—Gift made in lieu of dower—Nature of such gift.

The provisions of the Mahomedan Law applicable to gifts, made by persons labouring under a fatal disease, do not apply to a so-called gift made in lieu of a dower-debt which is really of the nature of a sale.

Ghulam Mustafa v. *Hurmat* (1) followed.

Abbas Ali v. *Karim Bakhsh* (2) and *Bibi Janbi* v. *Hazrath Saib* (3) referred to.

SECOND Appeal by Esahaq Chowdhry and another, the plaintiffs.

This appeal arose out of a suit brought by the plaintiffs for a declaration that the *kabala* set up by the defendant No. 1 was collusive and invalid and not binding upon them. One Chowdhry Ubaidul Huq, being entitled to and in possession of certain

* Appeal from Appellate Decree, No. 3951 of 1912, against the decree of Bejoy Gopal Bose, Subordinate Judge of Burdwan, dated Sep. 23, 1912, affirming the decree of Achinta Nath Mitra, Munsif of Burdwan, dated Jan. 17, 1911.

(1) (1880) I. L. R. 2 All. 854. (2) (1908) 13 C. W. N. 169.
(3) (1910) 21 Mad. L. J. 958.