

*Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Mitter.*

NUR KADIR (PLAINTIFF) *v.* ZULEIKHA BIBI (ONE OF THE  
DEFENDANTS).<sup>\*</sup>

1885  
June 1.

*Mahomedan Law—Hisanul—The custody of female minors before puberty—  
Mother's right.*

By the Mahomedan law, the mother is entitled to the custody of a female minor who has not attained her puberty in preference to the husband.

THIS was a suit for the recovery of possession of a wife. The plaintiff's case was that one Mehr-ul-nissa, who was a minor, had been given in marriage to him with the consent of her agnatic kinsman, Asmat Ali. The Munsiff dismissed the suit on the grounds that the fact of marriage (*aqd*) by *ijab qabul* had not been proved, that the girl was a minor, and had not attained her puberty, and that even if there had been a marriage, the girl (who in her evidence denied the fact) was free on her attaining puberty to annul the contract entered into with the consent of a kinsman of the degree of Asmat Ali. On appeal, the Subordinate Judge, without adverting to the question of puberty, found the marriage proved, and directed the mother of the girl to send her to the plaintiff's house. The appeal to the High Court from that decree (the suit being laid at Rs. 49) was heard by Mr. Justice Field who observed: "The only point that I decide is, that according to the view taken by the Munsiff upon the facts of this case, the plaintiff is not entitled to that which he asks, *vis.*, the possession of the girl. The appeal is decreed with costs."

Thereupon the plaintiff preferred an appeal under s. 15 of the Letters Patent.

Baboo *Akhil Chunder Sen* for the appellant.

Baboo *Soshi Bhushan Dutt* for the respondent.

\* Appeal under s. 15 of the Letters Patent, against the decree of O. D. Field, Esq., one of the Judges of this Court, dated the 23rd of June 1884, in appeal from Appellate Decree No. 814 of 1883, against the decree of Baboo Raj Chandra Sanyal, Rai Bahadur, Sub-Judge of Chittagong, dated the 16th of February 1883, reversing a decree of Moulvi Tofail Ahmad, Khan Bahadur, Munsiff of North Patna, dated the 29th of March 1882.

1885

The Court (GARTH, C.J., and MITTER, J.) delivered the following judgment:—

NUR KADIR  
v.  
ZULEIKHA  
BIBI.

This was a suit brought by the appellant, a Mahomedan, for the recovery of possession of his minor wife, Mehr-ul-nissa. It is not disputed that defendant No. 2, Masraf Ali, and defendant No. 3, Asraf Ali, are agnates of the same degree with Mehr-ul-nissa's father. The minor girl, it is also admitted, is living with her mother Zuleikha Bibi, defendant No. 5.

The plaintiff's case is that Asmat Ali gave Mehr-ul-nissa in marriage to him, and promised to send her to the plaintiff's house in the month of Jeyt following the marriage. According to this arrangement Mehr-ul-nissa not having been sent to the plaintiff's house, the plaintiff has brought the present suit.

On behalf of the defendants, both the factum and the validity of the marriage were denied.

The Munsiff dismissed the suit, upon two grounds, *viz.* (1) that the marriage was not established; and (2) that even if it took place, Mehr-ul-nissa, according to the Mahomedan law, being quite at liberty to cancel it on her attaining puberty, the alleged husband was not entitled to the custody of his minor wife until that period had arrived.

The Munsiff's judgment was set aside by the Subordinate Judge, who came to the conclusion that the marriage upon the evidence was established. As regards the second ground, upon which the Munsiff's judgment was based, he says that, until the marriage was actually cancelled, the plaintiff was entitled to the custody of his minor wife. It may be noticed here that there was no appeal against the finding of the Munsiff, that Mehr-ul-nissa had not yet attained the age of puberty. The Subordinate Judge therefore did not, and could not, with propriety have come to a different conclusion upon that point.

Accepting then the facts found by the lower Courts as correct, (as we are bound to do in second appeal) the question of law that arises is, whether the Subordinate Judge is right, according to the Mahomedan law, in removing the minor wife from the custody of her mother, and decreeing the plaintiff the possession of her person. In other words the question for decision is, whether, according to the Mahomedan law, the husband or the

mother is entitled to the custody of the minor wife, before she attains the age of puberty. This question was considered in an elaborate judgment of Mr. Justice *Norman*, in the matter of *Khatija Bibi* (1). After reviewing the authorities before him, the learned Judge came to the conclusion that, according to the Mahomedan law, the effect of the contract of marriage is to place the wife under the dominion of the husband, but that notwithstanding her marriage, the right to the care and custody of a girl belongs not to the husband, but to her mother, until she attains the age of puberty. At page 435 in *Bailie's Mahomedan Law*, with reference to the question of *hizanut* or custody of a girl, it is laid down that "so long as a girl who is married has no desire, her mother's right to her custody does not cease, till she is fit for matrimonial intercourse." In reversing the judgment of the Subordinate Judge the learned Judge of this Court has taken the same view of the law. The appeal will therefore be dismissed with costs.

1885  


---

 NUR KADIR  
 v.  
 ZULBIKHA  
 BIBI.

*Appeal dismissed.*

*Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Wilson and Mr. Justice Norris.*

UZIR CHRISTIAN (PETITIONER) v. ELI SEBA CHRISTIAN AND ANOTHER (RESPONDENT AND Co-RESPONDENT.)<sup>a</sup>

1885  
 June 9.

*Collusion—Divorce—Act IV of 1869, s. 13—Collusion in presentation of petition for dissolution.*

Subsequently to the institution of a suit for dissolution of marriage, and on the same day on which the suit came on for hearing, the petitioner and the respondent each filed petitions, setting out that it was agreed between them that from that date the marriage between them should be dissolved; that neither of them should have any claim against the other; that each should marry again at pleasure, and prayed that dissolution of the marriage might be granted on these terms, each party bearing his own costs.

*Held*, that this amounted to collusion within the meaning of s. 13 of Act IV of 1869, and that the petition must be dismissed.

THIS was a suit brought on the 4th January 1883 by one Uzir Christian, in the Court of the Judge of Nuddea, for dissolu-

<sup>a</sup> Divorce case No. 1 of 1884, referred by O. A. Kelly, Esq., District Judge of Nuddea, dated the 25th of October 1884.

(1) 5 B. L. R., 557.