

Before Mr. Justice Mitter and Mr. Justice Wilkinson.

FUSEEHUN (DEFENDANT) v. KAJO AND OTHERS (PLAINTIFFS.)*

1883
May 8.

Guardian—Guardianship of female minor—Mahomedan Law—Regulation X of 1793, s. 21—Act XL of 1858, s. 27—Act IX of 1861.

The effect of s. 21 of Regulation X of 1793, and of s. 27 of Act XL of 1858 is, that no person, other than a female, shall in any case be entrusted with the guardianship of a female minor.

Held, therefore, where a Mahomedan mother had by marrying a stranger forfeited her right to the guardianship of her children, that in the case of her female children their grandmother was entitled to be appointed guardian to the exclusion of male relatives. And the fact that the proceeding in which the right is sought to be established is under Act IX of 1861 does not affect the rule.

THIS was a suit under Act IX of 1861 for the guardianship of infant children, brought by their maternal grandmother one Mussamut Kajo, against their mother, Mussamut Fuseehun, and their paternal uncles Abu Saleh and Abu Mahomed. One of the children was a boy over the age of seven years, one a girl aged twelve years, who, according to Mahomedan law, had attained the age of puberty, and the other two children were girls under 12 years of age. The plaintiff claimed the guardianship of the children on the ground that their mother had married a stranger.

The District Judge held that the mother had by marrying a stranger forfeited her right to the guardianship of the children, and appointed the uncles guardians of the boy and the eldest girl, and appointed the plaintiff guardian of the younger girls. Mussamut Fuseehun appealed to the High Court.

Mr. Branson and Baboo Saligram Singh for the appellant.

Mr. Amir Ali and Moonshee Serajul Islam for the respondents.

The judgment of the Court (MITTER and WILKINSON, JJ.) was delivered by

MITTER, J.—This case was once before this Court, and was remanded to be retried with reference to the observations made in the remand judgment.

* Appeal from Original Order No. 346 of 1882, against the order of H. Beveridge, Esq., District Judge of Patna, dated the 31st July 1882.

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The proceeding in the lower Court was commenced by a suit under the provisions of Act IX of 1861 brought by Mussamut Kajo, the mother of Fuseehun, claiming the custody of her four grand children, *i.e.*, the children of Fuseehun. One of these children is a boy, and the other three are girls. They are all admittedly under age.

The District Judge finds that the boy is over seven years of age, and the eldest girl, Beebee Sulima, is nearly 12 years old, and has arrived at puberty in the sense in which that term is used in the Mahomedan law.

There was a counter-application made by Abu Saleh and Abu Mahomed, their uncles, and Mussamut Sobi, their father's mother, in which they opposed Mussamut Kajo's claim, and set up their right to the guardianship of these minor children.

The Judge has found that the other two girls, *viz.*, Surah and Habilea, have not yet arrived at puberty. Upon these findings he has declared that Mussamut Kajo is entitled to the custody of these two girls, and the uncles to the custody of the boy and Beebee Sulima. It was admitted before the learned Judge that the mother Fuseehun, having contracted a second marriage with a stranger, had forfeited her superior right of guardianship under the Mahomedan law.

In this appeal the order of the lower Court as regards the two younger girls is not questioned; but it has been contended that Mussamut Kajo is also entitled to the guardianship of the other two children.

So far as the question of guardianship of the boy is concerned, we see no reason to interfere with the order of the lower Court. It is in strict accordance with the provisions of the Mahomedan law on the subject.

But as regards the girl Sulima, we are of opinion that the order of the lower Court is not correct. It seems to us that the law upon this subject has been laid down by the Legislature, which, if it has modified the Mahomedan law, must govern our decision.

In s. 21, Regulation X of 1793, it was enacted that the guardianship of a female minor shall in no instance be entrusted to a person other than a female.

This law was applicable to persons whose estates were under the jurisdiction of the Court of Wards. But as regards minors, whose property could not be brought under the superintendence of the Court of Wards, it was enacted by s. 2 of Act XL of 1858 that the care of the persons of such minors, and the charge of their property, shall be subject to the jurisdiction of the Civil Court. Section 27 of that Act says that nothing in this Act shall authorize the appointment of any person other than a female as the guardian of the person of a female.

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Whatever may have been the provisions of the Mahomedan law upon the subject, the two legislative enactments referred to above have laid it down that a person, other than a female, shall in no case be entrusted with the guardianship of a female minor. The District Judge, referring to s. 27 of Act XL of 1858, says that the parties were not bound by the provisions of that section, because the proceeding before him was under Act IX of 1861. But this latter Act only lays down the procedure regulating a suit for the custody of minor children by guardians or other person entitled to their custody.

The Regulation and the Act referred to above on the subject of the guardianship of the person of a female minor laying down the substantive law with reference thereto must be followed in a suit under Act IX of 1861.

Although the order of the lower Court is in strict accordance with the Mahomedan law, as laid down in Baillie's Digest and Hamilton's Hadya, we may as well point out here that the law laid down by the late Mahomedan Jurists is more in accordance with the spirit of the legislative enactments referred to above. This is pointed out in a recent work of Mahomedan law by Syud Amir Ali, who, in page 196, says: "Among the Hanafis the mother is entitled to the custody of her daughter until she arrives at puberty. Among the Maliki Shafees and Hanabalīs the custody continues until she is married. According to the judgment of the Court of Algiers it appears that in several notable instances the Hanafi Kajis have followed the Maliki doctrines, and decided that the mother is entitled to the custody of her daughters until their marriage."

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The result is that the order of the lower Court as regards Beebee Sulima will be set aside, and Mussamut Kajo will be declared entitled to the guardianship of her person. The parties will bear their own costs.

Decree modified.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice Tottenham.

1883
 August 2.

IN THE MATTER OF THE PETITION OF ANAND LALL BERA AND OTHERS.
 ANAND LALL BERA AND OTHERS v. THE EMPRESS ON THE PROSECUTION OF AZIM PEON.

Public servant—Resistance to Public Servant—Warrant—Return of Warrant—Penal Code, s. 183.

A person was convicted under s. 183 of the Penal Code for offering resistance to the attachment of property by a public servant. The offence was committed on the 4th of February 1883, but the warrant under which the public servant acted was returnable on or before the previous day. *Held*, that the conviction was bad.

In this case the accused were found guilty by the Deputy Magistrate of Tumlook, in that they offered resistance to the taking of property by the lawful authority of a public servant, and thereby committed an offence punishable under s. 183 of the Penal Code. The facts were that one Azim, a revenue peon, in the service of Government, was charged with the execution of a warrant under the Public Demands Recovery Act, 1880, for the attachment of the movables of one Tulseeram Bera. On the 4th of February last, the peon proceeded to execute the warrant, and while doing so, he met with obstruction and resistance from the accused. The warrant under which the peon acted was returnable on or before the 3rd of February.

The accused moved the High Court to quash the order of the Magistrate.

Baboo *Jogesh Chunder Dey*, and Baboo *Dwarikanath Mookerjee*, for the petitioners.

The judgment of the Court (PRINSEP and TOTTENHAM, JJ.) was delivered by

*Criminal Motion No. 166 of 1883, against the order of Baboo U. C. Balayal, Deputy Magistrate of Tumlook, dated the 6th April 1883.