

APPELLATE CIVIL.

1905
July 10.*Before Mr. Justice Knox.*

KAULESRA (APPLICANT) v. JORAI KASAUNDHAN (OPPOSITE PARTY).

Act No. XXI of 1850 (Caste Disabilities Removal Act), section 1—Act No. VIII of 1890 (Guardians and Wards Act), section 17—Hindu law—Guardian and minor—Right of Hindu mother to be guardian of her infant daughter.

In the absence of any special reason to the contrary a Hindu mother has a better right to the guardianship of her infant daughter than the infant's paternal grandfather, and this right is not taken away by the fact that the mother has been outcasted. *Kanahi Ram v. Biddya Ram* (1) followed.

AFTER the death of the child's father Musammat Kaulesra, the mother of an infant daughter aged some three to five years, applied to the District Judge of Gorakhpur for a certificate of guardianship under Act No. VIII of 1890. This application was opposed by the paternal grandfather of the child. Amongst other reasons the grandfather objected to the appointment of Musammat Kaulesra as guardian of the child on the ground that she had been outcasted; but it appeared that the outcasting of Kaulesra was largely the work of the grandfather himself. Mainly upon this consideration the learned District Judge rejected the application for a certificate. Musammat Kaulesra thereupon appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellant.

Munshi *Gobind Prasad* and Babu *Iswar Saran*, for the respondent.

KNOX, J.—Musammat Kaulesra, the mother of an infant child, aged between three and five years, applied to the District Judge of Gorakhpur for the guardianship of the said infant. The father is dead. The parties are Hindus and the family is a joint Hindu family. Her application was resisted by the paternal grandfather of the child. He put forward four reasons why the mother should not be appointed guardian. Two of these reasons have been found to rest upon no foundation. One of the reasons given was an allegation that Musammat Kaulesra

* First Appeal No. 29 of 1905 from an order of W. Tudball, Esq., District Judge of Gorakhpur, dated the 26th of November 1904.

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was immoral. It does not speak well for the grandfather that he should make this gratuitous and unfounded attack upon the chastity of the infant's mother. A third reason given was that Musammat Kaulesra is a pauper. The Judge finds that there is nothing to show that she is so utter a pauper that she cannot maintain an infant. The last ground of attack was that Musammat Kaulesra has been outcasted. This outcasting dates from the 14th of June, 1904, and the petition which has led to the order which I am now considering was filed on the 6th of July, 1904. The dates are very significant. The learned Judge's mind has been much influenced by the fact that Musammat Kaulesra has been outcasted. But for that, it is easy to see from his judgment that he would not have passed the order that he has done. The outcasting in his eye is so serious a difficulty that he considers it for the welfare of the minor that the minor should be left in the charge of the paternal grandfather. I cannot, however, discover from the learned Judge's judgment that he took into consideration certain very important words which are to be found in section 17 of Act No. VIII of 1890. A Court in appointing a guardian of a minor is to be guided by what, consistently with the law to which the minor is subject, appears under the circumstances to be for the welfare of the minor. Clause 2 of section 17 lays down that in considering what will be for the welfare of the minor the Court is, *inter alia*, to have regard to the nearness of kin to the minor. Now, as regards nearness of kin, it is self-evident that Musammat Kaulesra is on a higher footing, if I may use the expression, than the paternal grandfather, Jorai Kasaundhan. This circumstance weighs with greater force when one bears in mind the very tender age of the infant.

I am fully aware that under the Hindu law it is the sovereign, who has to protect the rights of a minor, and while that law does not apparently contain any positive rules with respect to the rights of guardianship, still, as pointed out in Mayne's Digest of Hindu law, 5th Edition, paragraph 192, and Trevelyan on the Law Relating to Minors, page 37, the rights of certain relations of a Hindu minor have now by practice and custom almost acquired the force of law. Mr. Trevelyan

writes:—"The rights of the father, and of the mother after the death of the father, have been so long universally acknowledged as to be now indisputable." The outcasting of Musammat Kalesra need not be a consideration. Act No. XXI of 1850, which is still law and which has been recognised by this Court in the case of *Kanahi Ram v. Biddya Ram* (1), is sufficient to dispose of this objection. There can be little doubt that this outcasting is the deliberate work of Jorai Kasaundhan, and it casts a light upon his fitness to be a guardian. A man who does not hesitate to foul the reputation of his own kindred without cause and to follow it up by an outcasting is not the man that I should select to be a guardian of an infant child. Even from a worldly point of view there does not seem much to choose between the condition in life of Jorai Kasaundhan and Musammat Kalesra. I gave the parties time, so that if Jorai Kasaundhan had been disposed to make amends and bring about the readmission of Musammat Kalesra, no need for these further orders would have arisen. Unfortunately the parties could not come to terms. I, therefore, allow this appeal, set aside the order of the Court below, and direct that Musammat Kalesra be appointed guardian of the infant in dispute. The appellant will get her costs in all Courts.

Appeal decreed.

Before Mr. Justice Knox and Mr. Justice Aikman.

GAYA SINGH AND ANOTHER (PLAINTIFFS) v. RAJA RAM SINGH
AND ANOTHER (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Sale of land by Government.

When Government has acquired land permanently it does not become a co-sharer in the village to which the land originally appertained, and on a sale thereof the provisions contained in the village *wajib-ul-arz* which deal with sales by co-sharers in the village are not applicable.

IN this case the Government having acquired under the provisions of the Land Acquisition Act, 1894, certain pieces of land for the purposes of a railway subsequently discovered that they would not be required. The land was, therefore, first offered to

* Second Appeal No. 1152 of 1903 from a decree of Syed Muhammad Tajammul Husain, Subordinate Judge of Ghazipur, dated the 12th of June 1903, confirming a decree of Babu Hari Mohan Banerji, Munsif of Ghazipur, dated the 9th of December 1902.

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