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of opinion that the objection raised, as regards the sale of the property, in the court of first instance was a valid objection, and the property was not liable to sale in execution of the mortgagee's decree. As the order for sale was an invalid and illegal order the sale which has taken place in pursuance of that order must fall to the ground and must be deemed to be a nullity. The result is that this appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Figgott and Mr. Justice Dalal.

EMPEROR, v. SITAL PRASAD AND OTHERS.*

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November, 17.

dot no. XLV of 1860 (Indian Penal Code) section 361, explanation—“ Lawful guardian ”—Hindu Law—Nearest major male relative not necessarily the lawful guardian of a female minor.

The only persons having an absolute right to the custody of a Hindu minor are the father and the mother of the minor. No such right exists in the person who happens to be the nearest major male relative of the minor, and such a relationship would not in law be a defence to a charge of kidnapping a minor from the custody of a *de facto* guardian.

The facts material for the purpose of this report may be stated as follows:—Musammat Rajpatia was a girl of eight years of age and she lived in the custody of her brother's widow, Musammat Chandarkali. Ram Tawakkal, son of Musammat Rajpatia's paternal uncle, was accused of having, with the help of two others, kidnapped the girl from the custody of Musammat Chandarkali for the purpose of giving her in marriage. All the three were convicted under section 366, Indian Penal Code, and they appealed to the High Court. It appeared that the only near relations Musammat Rajpatia had were two brothers, both of whom were minors.

Mr. J. M. Banerji, for the appellants:—

My first point is that, even admitting that Ram Tawakkal did, as a matter of fact, take away the girl from the custody of Musammat Chandarkali he committed no offence. The words “lawful guardian” in section 366, Indian Penal Code, which defines the offence of kidnapping, must mean the legal guardian; and

*Criminal Appeal no. 857 of 1919, from an order of Abdul Hasan, Additional Sessions Judge of Jaunpur, dated the 3rd of July, 1919.

Musammat Chandarkali was not the guardian, under the Hindu Law, of Musammat Rajpatia. Under the Hindu Law, no female other than the mother or the paternal grandmother has a right to guardianship of a minor. Musammat Chandarkali as brother's widow had no right of guardianship over either the person or the property of the minor. On the other hand, Ram Tawakkal being the nearest adult male relative and an agnate had the preferential right to guardianship of the minor and to giving her in marriage. It was he who was the legal guardian; and consequently, even if it be conceded that Musammat Chandarkali's *de facto* guardianship for the time being was lawful, it could be terminated at the will of the *de jure* guardian, and he could commit no offence in taking away the minor from the custody of Musammat Chandarkali. The following cases illustrate how, in criminal charges of kidnapping a minor girl, the courts have upheld the rights of the legal guardian; *e. g.*, the father of a Hindu girl as against the mother, the husband of a Hindu girl as against her father, or the mother of a Muhammadan girl who has not attained the age of puberty as against the husband; *Empress v. Prankrishna Surma* (1), *In the matter of the petition of Dhuronidhur Ghose* (2), *Korban v. King-Emperor* (3). In the course of an exhaustive judgment on the subject, in the case of *Jagannadha Rao v. Kamaraju* (4), BENSON, J. observed that a temporary guardianship did not exclude the higher legal guardianship. That judgment was approved of by this Court in the case of *King-Emperor v. Ganesh* (5). The temporary guardianship of Musammat Chandarkali was, therefore, subject to the legal guardianship of Ram Tawakkal, and he, or persons acting at his instance, could not be guilty of kidnapping in taking away the girl from the custody of Musammat Chandarkali.

[Counsel then argued on the facts and contended that it was not proved that the accused took away the girl.]

The Government Pleader (Babu Sital Prasad Ghosh,) for the Crown:—

(1) (1882) I. L. R., 8 Cal., 969.

(3) (1904) I. L. R., 32 Cal., 444.

(2) (1889) I. L. R., 17 Cal., 298.

(4) (1900) I. L. R., 24 Mad., 284.

(5) (1909) I. L. R., 31 All., 448.

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On the question of law I submit that the cases cited on behalf of the appellants are quite distinguishable from the circumstances of the present case. Here the finding of the Sessions Judge based on evidence, which is all one way, is that Musammat Chandarkali was the *de facto* guardian of the minor girl, who was being brought up, maintained and looked after by her, and that Musammat Chandarkali being the only adult member of the minor's branch of the family, which was separate from Ram Tawakkal's branch, she naturally took entire charge of the minor. The cases cited were not cases of such a *de facto* guardian; moreover, they were cases which dealt with the rights of a father, or a husband, whose position as guardian is unquestionable. In the present case Ram Tawakkal has no such well recognized status of guardianship. In the case of *Bhikuo Koer v. Chamela Koer* (1), it was held that in respect of a Hindu minor no relation other than the father and the mother had an absolute right of guardianship. A distant relation like Ram Tawakkal has no such right. On the other hand, if he and Musammat Chandarkali were the rival applicants for guardianship of the girl, the court having regard to the circumstances mentioned above would very probably have given preference to Musammat Chandarkali. It is submitted, therefore, that Ram Tawakkal's claim to be regarded as the lawful guardian in supersession of the guardianship of Musammat Chandarkali is untenable.

[The rest of the argument was directed to questions of fact.]

DALAL, J.—Sital Prasad, Ram Swarath, and Ram Tawakkal, Brahmans by caste, have appealed from their conviction of an offence under section 366, Indian Penal Code. The charge against them was one of kidnapping a minor girl, Musammat Rajpatia, 8 years of age, from the custody of her lawful guardian Musammat Chandarkali, in order to compel her to marry a person against her will. The willingness or otherwise of a minor Hindu girl to marry a particular person is not a matter for consideration at the time of her marriage, so it will be difficult to make a distinction between a marriage by the agency of a kidnapper and a marriage with the help of her relations so far as her own personal desire and consent are concerned.

This, however, is a point of small significance because in the event of the taking away of the girl being proved, the persons found guilty of kidnapping her would be guilty of an offence under section 363, Indian Penal Code, which provides for a substantial punishment. Musammat Rajpatia is a sister of Musammat Chandarkali's deceased husband, Bikarmajit, and her father and the father of Ram Tawakkal appellant were own brothers. The fathers of both Musammat Rajpatia and Ram Tawakkal are dead. There are two minor brothers of Musammat Rajpatia alive. The case for the prosecution was that the three appellants went to the apartment of Musammat Chandarkali on the night of the 28th of April, last, picked up the minor girl, Musammat Rajpatia, who was sleeping by her aunt's side, and ran away.

[His Lordship then set forth further facts of the case.] I have read the evidence on the record and considered the circumstances of the alleged arrest of the appellants, Sital Prasad and Ram Swarath. I am satisfied that the prosecution story of the taking away of the girl is false.

[His Lordship then discussed the evidence.]

I hold that there was no taking away of the minor girl from the custody of Musammat Chandarkali. The charge, therefore, fails and the appellants are entitled to an acquittal.

A learned Judge of this Court referred this case to a Bench on a point of law raised by the appellants' learned counsel during argument. It was argued that Ram Tawakkal was the guardian of the girl under the law applicable to Hindus in this province, and that, therefore, the taking away of the girl by him and his associates from the custody of Musammat Chandarkali did not amount to kidnapping as defined in section 361, Indian Penal Code. I would accept the inference of law under the Indian Penal Code if Ram Tawakkal were proved to be the girl's guardian under the Hindu Law. The first explanation to section 361, Indian Penal Code, which defines lawful guardian, extends the accepted definition of these words under the civil law governing the minor. The definition does not exclude the person who would be the minor's guardian under the civil law applicable to the minor. This precaution of extending the meaning of the words

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“lawful guardian” under the criminal law was taken to preclude persons other than the civil law guardian, from raising the technical plea that the legal relation of ward and guardian did not exist between the minor and the person from whose actual custody the minor may happen to be taken away. The person in temporary charge of the minor cannot, however, take advantage of this definition given in the first explanation to section 361, Indian Penal Code, as against the guardian at civil law. If I had been satisfied that Ram Tawakkal was the guardian of the minor girl, Musammat Rajpatia, at civil law I would not have inquired further into this case. Such a relationship would have saved him and the other appellants from prosecution under section 363, Indian Penal Code, even in the case of the taking away of the girl being proved. I am of opinion that Ram Tawakkal is not the guardian of Musammat Rajpatia under the Hindu Law. “There was not, even before the passing of Act no. VIII of 1890, any one other than the father or mother who had an absolute right to the custody of a Hindu minor.” This was decided in the case of *Krishto Kishore Nogi v. Kadu Moye Dasi* (TREVELYAN and STEVENS, JJ.), *Musammat Bhikno Koer v. Musammat Chamela Koer* (1). Under the Hindu Law Ram Tawakkal has not an absolute right to the custody of Musammat Rajpatia on the sole ground that he happens to be the nearest major male relation of the girl. It was open to the defence to prove that Ram Tawakkal was appointed a guardian either by a court of law or by the brotherhood or that he had actually assumed such responsibility without any objection being raised by the blood relations or by the brotherhood. If such proof had been forthcoming it could have been presumed that Musammat Chandarkali had custody of the girl Rajpatia in the capacity of an agent of Ram Tawakkal. There is no such proof on the record. At the trial it was abundantly proved that Musammat Chandarkali acted and was acknowledged as the guardian of the minor girl, and not Ram Tawakkal. Ram Tawakkal is separate from the minor children of his uncle, and the guardianship of the children has been undertaken by Musammat Chandarkali, the eldest and only major member of the divided

family, using the word family in its general sense and not in the restricted sense of a collection of males under the Hindu Law. That such is the fact is indicated even by the nature of the defence set up by the appellants. The defence of the appellants Sital Prasad and Ram Swarath was that the marriage negotiations were carried on between them and Musammat Chandarkali, who acted through her agent Ram Tawakkal. It was never suggested that Ram Tawakkal had consented to the marriage and that such consent was sufficient for the performance of the marriage contract. Ram Tawakkal himself when he surrendered in the court of the committing Magistrate, tried to save himself by taking the part of Musammat Chandarkali. On the facts, therefore, I would set aside the convictions and sentences passed on the three appellants.

PIGGOTT, J.—I concur generally, and more particularly with regard to the facts. The appellants were in this difficulty, that Ram Tawakkal was never frank with the court and that counsel on his behalf eventually took up a position, at least by way of an alternative defence in this Court, which had never been suggested in the court below. As regards the two appellants other than Ram Tawakkal, I have no doubt that, whatever they did, (and I do not believe they did precisely what the prosecution witnesses have stated) was done in the *bond fide* belief that the consent of Musammat Chandarkali had been obtained to the proposed marriage of the minor girl.

Ram Tawakkal's plea that, even on the findings of fact recorded by the learned Sessions Judge, he was entitled to an acquittal, labours under this difficulty, that his own defence in the trial court involved a virtual admission of Musammat Chandarkali's position as the *de facto* guardian of the minor. I am, however, satisfied that, on the existing state of the record, it is impossible to feel sufficient confidence in the prosecution evidence to find any of the appellants guilty.

Conviction set aside.

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