

1926

SARJU
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BIJAI
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SINGH.

money by which he has been benefited from the defendant's pocket. The whole thing is small and not worth all the trouble that has been taken over it by remanding it for further hearing. The plaintiff has not chosen to appear here, and we think the equitable thing is to make an end of the whole case by declaring that the plaintiff will be owner in possession of the trees when he has repaid to the defendant the sum of Rs. 30, the price of the trees, together with the sum of Rs. 9-10-0 representing interest at 6 per cent. per annum from the date of the purchase down to the present moment, the total being Rs. 39-10-0. In other words, we declare that the defendant has a charge to that extent over the trees. If the plaintiff does not pay the Rs. 39-10-0 within six months from today, the trees will become the property of the defendant.

Before Sir Cecil Walsh, Acting Chief Justice, and Mr. Justice Banerji.

1926
December,
16.

ABDUL AZIZ KHAN (APPLICANT) v. NANHE KHAN
(OPPOSITE PARTY).*

Act No. VIII of 1890 (Guardians and Wards Act)—Guardian and minor—Right of father to custody of minor son.

A father is not only the natural guardian, but has an inalienable right to the custody of his minor son, unless there are overwhelming circumstances to the contrary. *In re Thain*; *Thain v. Taylor* (1), followed.

THIS was an application by Abdul Aziz for guardianship of the person of his minor son, aged about nine years. The maternal grandfather, Nanhe Khan, contested the application on the ground that he and his wife had been looking after the minor ever since his birth. The boy appeared to be fairly well looked after by the maternal grandfather. The mother of the

*First Appeal No. 51 of 1926, from an order of B. Bennet, District Judge of Agra, dated the 5th of December, 1925.

(1) (1926) 95 L.J., 292.

minor died about five years ago. Abdul Aziz, being in military employment, had to be away at various stations at which the regiment might be quartered. He used to send some money now and then to the maternal grandfather for the maintenance of the boy. Abdul Aziz had married again. On these facts the District Judge, while holding that the father was the legal guardian, refused the application, saying that the matter was for the discretion of the court. Abdul Aziz appealed to the High Court.

Pandit *M. N. Raina*, for the appellant.

Dr. *M. Waliullah*, for the respondent.

WALSH, A. C. J., and BANERJI, J. :—In our opinion this appeal must succeed. The Judge is right in saying that it is a matter for his discretion—but it must be a judicial discretion, exercised upon recognized principles. The recognized principle is that a father is not only the natural guardian but has an inalienable right unless there are overwhelming circumstances to the contrary. The report of the Tahsildar does him great credit. But it is distinguished rather for goodness of heart than of head. There is hardly a reason which can be considered adequate to overrule the right of the father. It so happens that an English Court of Appeal has recently decided the same point in almost precisely similar circumstances in *In re Thain; Thain v. Taylor* (1). The appeal must be allowed and the child restored to the custody of the father. We think it better to direct that he, if he can, should go personally to take delivery of the child, after giving 24 hours' notice of his intention to do so. If he is prevented by his duties, he can send one of his women folk with an order signed by him. The appeal is allowed and the appellant must have his costs.

Appeal allowed.

(1) (1926) 95 L.J., 292.

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ABDUL AZIZ
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