1938

PURSHOTTAM DAS v. GORAKHPUR ELECTRIC SUPPLY COMPANY

It appears to me that I am bound to follow these cases and to hold that a holder of fully paid up shares in a company is a contributory within the meaning of section 158 of the Indian Companies Act. Where a term has been defined in a Statute it must be given that meaning throughout the Statute unless some provision makes it clear that for certain purposes the term must be given another meaning. It appears to me that I am compelled to hold that the term "contributory" as used in section 186(2) of the Indian Companies Act includes a fully paid up shareholder and accordingly such a shareholder cannot, where the company is limited, claim a set off in the circumstances of the present case. It may well be argued that in the particular circumstances of this case the decision of the Official Liquidators works an injustice, but be that as it may they had no alternative in my view but to reject this claim to a set off. They can only allow a set off in the terms of the Statute and in my view the express term of the Indian Companies Act prohibits a set off in this case.

For the reasons which I have given this application fails and is dismissed.

APPELLATE CIVIL

Before Mr. Justice Harries and Mr. Justice Misra

1938
August, 29

KUNDAN (APPLICANT) *v.* AISHA BEGAM (OPPOSITE PARTY)*

Guardians and Wards Act (VIII of 1890), section 17—Selection of guardian—Personal law of minor cannot be overriden even in the interests of the minor—Muhammadan law—Mother cannot be appointed guardian of daughter if mother has married a person who is not related to the daughter within the prohibited degrees.

Section 17 of the Guardians and Wards Act does not permit the court to subordinate the personal law to which the minor is subject, to the consideration of what will be for the minor's welfare.

According to the Muhammadan law the mother cannot be appointed the guardian of her minor daughter if the mother

*First Appeal No. 98 of 1937, from an order of Harish Chandra, District Judge of Moradabad, dated the 10th of April, 1937.

1938

KUNDAN v. AISHA BEGAM

has married a person who is not related to the daughter within the prohibited degrees.

A Muhammadan mother cannot, therefore, in such circumstances be appointed guardian of her minor daughter, although the mother may be otherwise a most fit person to be appointed the guardian in the best interests of the minor.

Sir *Syed Wazir Hasan* and Mr. *B. N. Misra*, for the appellant.

Mr. *L. N. Gupta*, for the respondent.

HARRIES and MISRA, JJ.:—These are two connected appeals directed against the order of the learned District Judge of Moradabad, dated the 10th of April, 1937, by which he accepted the application of Mst. Aisha Begam and rejected that of Mst. Kundan to be appointed guardian of the person of a girl named Hasina Begam. Aisha Begam is the mother and Mst. Kundan alias Rafiqa Begam is the grandmother of the girl. The girl was living with her grandmother and the first application was made by the mother Aisha Begam on the 22nd of January, 1936. The object of making the application was stated to be to take the girl from an undesirable environment in which she and her grandmother are alleged to have been living. It is said that this grandmother was originally a prostitute, that after the death of her husband she lapsed into her former life and that some female relations with whom she is living are still carrying on the profession of prostitution.

About two months after the application by the mother, the grandmother made a counter application in which she asked that she should be appointed guardian of the girl in preference to the mother. Both these applications were considered together by the learned District Judge. He held that although the mother Aisha Begam has married outside the prohibited degree of relationship to the girl, she is entitled to be appointed guardian in preference to the grandmother, who, though she is a very old woman, is still living in the same house with her nephew Hari Singh whose sisters are professional prostitutes. Accordingly he

granted the application of the mother Aisha Begam and rejected that of the grandmother who is the appellant before us.

It may be observed that one of the questions before the learned District Judge was whether the girl had attained majority. The girl and the grandmother both alleged that she had become major and the guardianship proceedings were therefore incompetent. Evidence was led on this point and the finding arrived at by the learned District Judge was that the girl is about sixteen years of age.

It may be further observed that the girl herself was quite unwilling to go and live with her mother but the learned Judge thought that there was no justification for the fears which the girl entertained of her mother.

On behalf of the appellant it is contended that the mother is disentitled under the Muhammadan law to be appointed as guardian of the girl, and the learned District Judge was therefore wrong in appointing her as such. We consider that this contention is right and must be accepted. The learned District Judge has given no reasons for overriding the express provisions of the Muhammadan law on the point. It cannot be disputed that a female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody if she marries a person not related to the child within the prohibited degrees, for example, a stranger. Section 17 of the Guardians and Wards Act, on which learned counsel for the mother relies, says that the court appointing the guardian of a minor shall be guided by what appears in the circumstances of the case to be for the welfare of the minor but that the appointment shall be in consonance with the personal law to which the minor is subject. As pointed out in the Lahore case of *Mehraj Begum* v. *Yar Mohammad* (1) the Guardians and Wards Act does not permit the court to subordinate the law to which the minor is

(1) A.I.R. 1932 Lah. 493

1938

KUNDAN v. AISHA BEGAM

subject, to the consideration of what will be for the minor's welfare. The learned Judge of the Lahore High Court quoted with approval the observations in the Oudh case of *Ansar Ahmad* v. *Samidan* (1) in which it was held that where the law definitely lays down that an appointment cannot be made inconsistently with the personal law to which the minor is subject, the court cannot disregard that law even in the interest of the minor.

For these reasons we cannot uphold the appointment of the mother as guardian even though that appointment be considered to be in the interests of the minor. The appeal of the grandmother against the order of the learned District Judge appointing the mother as guardian is therefore accepted and the order appointing the mother as guardian is set aside.

As to the appeal against the order dismissing the application of the grandmother to be appointed as guardian it is unnecessary for us to discuss the merits of the case because the matter can be disposed of on the question of the age of the girl. We need only say this much that we agree with the learned District Judge that considering the surroundings in which the grandmother is living, it would be undesirable to make her the custodian of the girl.

To substantiate the allegation that the girl was major, the grandmother produced a copy of an entry in the birth register and some medical evidence, but the learned District Judge preferred to accept the somewhat vague statement of the mother of the girl to the effect that the girl was about sixteen years of age. The attention of the learned District Judge does not seem to have been drawn to the fact that in her application for guardianship made by the mother on the 22nd of January, 1936, she had given the age of the girl as fifteen to sixteen years and the year of her birth as 1919 or 1920. This statement in the application was verified on oath.

(1) A.I.R. 1928 Oudh 220.

According to this entry itself the girl was at least seventeen years of age in 1937 when the mother stated in court that she was only fifteen or sixteen. In all the circumstances of the case, we are disposed to think that the medical evidence which corroborated the evidence of the grandmother might have been accepted as sufficient. And on the allegation of the grandmother that the girl was already a major her application to be appointed as guardian was liable to be dismissed. Even assuming however that the girl did not attain majority in 1937, there can be no doubt that according to the statement of the mother in the latter's application of the 22nd of January, 1936, the girl has either already attained the age of eighteen or is just about to attain it. Consequently even if it be held that she is yet under eighteen years of age, no useful purpose would be served by continuing the proceedings for appointment of a guardian by sending back the case and asking the District Judge to find out whether there is any third person fit to be appointed as guardian and then appointing him. By the time the District Judge comes to decide the matter, the girl will undoubtedly have become major.

In the result we accept the appeal of the grandmother Mst. Kundan and set aside the order of the learned District Judge appointing the mother Mst. Aisha Begam as guardian of the person of the girl. The applicant will have her costs of the case brought by Aisha Begam for appointment as guardian both in this Court and in the lower court. The appeal against the order refusing to appoint the appellant Mst. Kundan as guardian of the girl is dismissed. As regards this case both parties will bear their own costs in both the courts. We do not consider it necessary or desirable to direct that any further proceedings be taken in regard to the appointment of a third person as guardian.