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by us, falls, I think, under the second class, *i.e.*, an act of law. It is interesting to observe, although it is unfortunate that we have not got the Report, that Mr. Sohoni, in the 11th edition of his Criminal Procedure Code, at page 1076, when discussing section 514 of the Criminal Procedure Code, states that in the United States of America it has been definitely held that it is a good defence to an action on a recognizance for a person's appearance to answer a criminal charge that he had been arrested and committed to jail in another country [*People v. Barlet* (1)].

The learned Government Advocate does not think that in this case he can support the order which has been passed. I think there is no doubt that in this case the bail bond should not have been forfeited the failure to produce the person being due to an act of law. The order will be set aside and this application will be allowed. If the amount has been paid it will be refunded.

Ross, J.—I agree.

Application allowed.

S. A. K.

APPELLATE CIVIL.

Before Mullick and Kulwant Sahay, J.J.

MUSSAMMAT ABBASI BEGUM

v.

MUSSAMMAT YAQUTI BEGUM.*

Guardian and Wards Act, 1890 (Act VIII of 1890), sections 34, 41 and 45—Ex-guardian, failure of payment by—Duty of the Court to ascertain what sum was actually due—Order imposing fine, legality of.

* Appeal from Original Order no. 6 of 1924, from an order of T. Luby, Esq., l.c.s., District Judge of Muzaffarpur, dated the 22nd December, 1923.

In order to enable the Court to impose a fine under section 45 of the Guardian and Wards Act, 1890, for non-compliance with an order under section 41(3), it must be shown that the sum for the non-payment of which the fine has been imposed was actually due from the guardian, and, if the guardian represents that the sum is not due, no fine can be imposed unless it is first ascertained whether the sum which he has been ordered to pay is really due from him. An order of the Court, therefore, imposing a fine without any enquiry as regards the amount actually payable by the appellant is improper.

Jagannath v. Mahesh Chandra Pal(¹), applied.

This was an appeal against an order of the District Judge of Muzaffarpur, dated the 22nd December, 1923, whereby he imposed a fine of Rs. 50 upon the appellant under section 45 of the Guardian and Wards Act. The facts which led to the passing of this order were shortly these :—

The appellant Mussammat Abbasi Begum was appointed guardian under the Guardian and Wards Act of her two minor grand-daughters Mussammat Ummatul Soghra and Mussammat Yaquti Begum. Sometime before May, 1921, the minor Ummatul Soghra was married to one Mohammad Hossain and on her marriage her husband was appointed her guardian, and the appellant Abbasi Begum was discharged. The appellant, however, continued as guardian of the other minor Yaquti Begum. After the marriage of Ummatul Soghra and the appointment of Mohammad Hossain, an account was taken by a Commissioner appointed by the District Judge from the guardian Mussammat Abbasi Begum, and upon the report of the Commissioner the learned District Judge, by his order dated the 2nd September, 1921, found that a sum of Rs. 4,951-2-9 was due from Mussammat Abbasi Begum to the two minors of which one-half, namely, a sum of Rs. 2,475-9-4½, was due to Ummatul Soghra and the remaining half was due to Yaquti Begum.

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This appeal was not concerned with the share of Mussammat Ummatul Soghra which appeared to have been duly paid up by the appellant to Mohammad Hossain, the husband and guardian of Ummatul Soghra. The present appeal was concerned with the sum of Rs. 2,475-9-4½ which was found by the District Judge to be due to the minor Yaquti Begum. On 18th September, 1922, a settlement was come to between Mussammat Abbasi Begum, Mohammad Hossain husband of Ummatul Soghra, one Haji Saiyid Ali Nawab the maternal grandfather of the minors, Mussammat Mustafa Begum the maternal grandmother of the minors, and Mr. Saiyid Ahmed Nawab the maternal uncle of the minors. Under the settlement the appellant Mussammat Abbasi Begum made a gift of all her properties to the minors and she resigned from the guardianship of Mussammat Yaquti Begum and suggested that Mr. Saiyid Ahmed Nawab, the maternal uncle of the minor, might be appointed her guardian. In this settlement she admitted her liability to pay the sum of Rs. 2,475-9-4½ which was found due from her to the minor Yaquti Begum under the order of the District Judge dated the 2nd September, 1921. The learned District Judge accepted this settlement and Abbasi Begum was discharged from the guardianship and Mr. Saiyid Ahmed Nawab was appointed guardian of the minor Yaquti Begum. Mr. Ahmed Nawab continued as guardian up to the 23rd July, 1923, when he was discharged and Saiyid Azizuddin Hossain to whom the minor Yaquti Begum had been married in the meantime, was appointed her guardian. Out of the sum of Rs. 2,475-9-4½ payable by the appellant she paid a sum of Rs. 1,000 only to Mr. Ahmed Nawab and she had not paid the balance of Rs. 1,475 odd. The present guardian Saiyid Azizuddin Hossain made an application on the 17th September, 1923, praying that the ex-guardian Mussammat Abbasi Begum be ordered to pay up the remaining sum of Rs. 1,475 odd besides interest and also the realizations for the *kists* of *Jeth* and *Bhado* of

1328, *Fasli*, and the full *kists* of 1329 *Fasli*, with interest. Notice of this application was ordered to be served upon Mussammat Abbasi Begum; and on the 4th of October, 1923, she filed an objection in which she stated that out of the sum of Rs. 2,475 odd payable by her, she paid Rs. 1,000 to Mr. Saiyid Ahmed Nawab, leaving a balance of Rs. 1,475 only as due from her; that the sum of Rs. 2,475 odd which was found to be due from her was made up of certain rents due from the tenants which she had failed to realize in respect of the share of the minor Yaquti Begum; that she was making arrangements to realize the un-realized rent from the *thikadars* and *bandobastidars* and *rai'yats* but that as she had retired from the guardianship of the minor and Mr. Saiyid Ahmed Nawab had been appointed guardian she had failed to realize the same; that thereupon Mr. Saiyid Ahmed Nawab had insisted that she should not realize the rents from the tenants on account of the share of Yaquti Begum and that he himself would do so and that, as a matter of fact, Mr. Saiyid Ahmed Nawab had made realizations for the periods for which she, the appellant, had been made liable, and that such realizations would appear from the accounts filed by Mr. Saiyid Ahmed Nawab in Court in respect of the share of Yaquti Begum; and she prayed that Mr. Saiyid Ahmed Nawab be examined and the accounts be referred to. The learned District Judge rejected this objection of the appellant Abbasi Begum by his order dated the 4th October, 1923. He observed in the said order that all questions were discussed and settled by the District Judge under his order dated the 2nd September, 1921, referred to above, that the sum of Rs. 1,475 was still due from Abbasi Begum and that it made no difference who had been realizing the minor's rents since the order of the 2nd of September, 1921, was passed. He thought that there was no necessity for examining witnesses as proposed by Abbasi Begum because there was nothing to examine them about and he directed that Mussammat Abbasi Begum must pay up the amount due by November 13th,

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without fail otherwise she would be fined under section 45. On the 13th November, 1923, Mussammat Abbasi Begum filed a petition praying that the order of the 4th of October might be reviewed. Objection was raised on behalf of the present guardian and the learned District Judge rejected Mussammat Abbasi Begum's petition for review by his order dated the 8th December, 1923, which ran thus :

" Parties heard. It seems quite clear that the sum of Rs. 1,475 is quite separate from the arrears of rent, so Abbasi Begum's objection to payment is invalid. She must pay Rs. 1,475 in cash as already ordered together with interest at 6 *per cent.* for the two years during which she has withheld payment. This amount must be paid into Court or to the minor's guardian by December 22nd without fail, or a fine will be imposed."

Mussammat Abbasi Begum having failed to make the payment, the learned District Judge made the order imposing the fine of Rs. 50 upon her on the 22nd of December, 1923, against which the present appeal was filed.

It was contended on behalf of the appellant that the order of fine was bad in law inasmuch as the fine had been imposed for non-payment of a sum of Rs. 1,475 odd which was not really due from her. It was contended that a portion of this sum represented certain unrealized rents from tenants and, as those rents had been collected by Mr. Ahmed Nawab, she could not be made liable to pay the whole of the sum of Rs. 1,475, and no fine could be imposed upon her for non-payment of the sum which was not really due from her. On behalf of the respondent it was contended that the question as to whether any portion of the unrealized rent was realized by Mr. Ahmed Nawab did not arise in the present case and that the learned District Judge was not bound to examine the accounts of Mr. Ahmed Nawab or to take evidence on the question as to whether such unrealized rents had been realized by Mr. Ahmed Nawab. It was further contended that the question as regards the amount found by the District Judge to be due from Mussammat

Abbasi Begum was finally settled by the order of the District Judge and that no appeal lay to the High Court against such order, and it was not open to the appellant to raise the question in appeal.

Khurshaid Hasnain and *Syed Ali Khan*, for the appellant: The District Judge has failed to exercise his jurisdiction by not making an enquiry into the allegations made by me in the Court below. I was saddled with the liability to pay the balance of realized rents as well as unrealized rents to the minor. The new guardian who succeeded me in office made collections of those unrealized rents and credited them to the account of the minor who now seeks to be paid twice over. In fact there has been an indirect payment by me to the minor through the agency of the new guardian who realized and placed at the disposal of the minor a sum which in law and equity belonged to me. The Judge should have held an enquiry and ascertained whether the sum was still really due from me. His order imposing on me a fine under section 45 cannot be upheld if there has in fact been a payment in the form of realization by the new guardian who is only an agent of the minor.

W. H. Akbari (with him *Bhaqwan Prasad*), for the respondent: A requisition under section 41, Guardian and Wards Act, is final. Hence once the ex-guardian has been made liable by an order of the Judge for the payment of a certain amount found due to the minor the order is not open to question in future. It is not open to the ex-guardian to assail this order or get round it and say that the sum is not actually due from her. The liability is there and it cannot be challenged. The only question that can be gone into at this stage is whether the order imposing a fine under section 45 against which this appeal is directed is bad or improper and whether or not the conduct of the appellant in deferring payment was such as to make the order justifiable. There has been a deliberate default on her part and the orders of the District

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Judge, the validity whereof cannot be questioned in this appeal, have been constantly set at naught. I submit, therefore, that the Judge had a perfect discretion in the matter and his decision in such matters should not ordinarily be interfered with.

Syed Ali Khan, in reply : In order to determine the legality or otherwise of the order of fine, it is necessary to test the validity of the requisition itself. No doubt a requisition either under section 41 or section 34 is final, but nevertheless there is no bar to an incidental test of the validity of the requisition which forms the basis of a fine under section 45. In *Jagannath v. Mahesh Chandra Pal* (1) their Lordships on appeal from an order of fine under section 45 held that, inasmuch as the requisition under section 34(d) was not in conformity with section 34(c), the fine could not be validly imposed. It appears, therefore, that the question of the validity of the requisition was gone into as a side-issue. The same principle will apply to a requisition under section 41, as they are analogous sections.

Cur. adv. vult.

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Dec., 2.

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows) : I am of opinion that the question as regards the amount actually due from the appellant at the time she was ordered by the District Judge to pay the sum to the present guardian on the 4th of October, 1923, ought to have been gone into by the learned District Judge. The order of the 2nd of September, 1921, was apparently passed under section 34 of the Guardian and Wards Act at a time when Mussammat Abbasi Begum was still the guardian of the minor Yaquti Begum. It is contended by the learned counsel for the respondent that the order of the 4th of October, 1923, was passed under sub-section (3) of section 41 of the Guardian and Wards

(1) (1920-21) 25 Cal. L. J. 149.

Act and that no appeal lies against such an order. Section 45 of the Act, however, provides that the guardian shall be liable by order of the Court to a fine not exceeding Rs. 100 in case he fails to pay into Court the balance due from him in compliance with a requisition under clause (c) of section 34, or if the guardian, after he has ceased to be such, fails to deliver any property in compliance with a requisition under sub-section (3) of section 41 of the Act. Therefore, in order to enable the Court to impose the fine it must be shown that the sum for the non-payment of which the fine has been imposed was actually due from the guardian, and if the guardian represents that the sum is not due, no fine can be imposed unless it is ascertained as to whether the sum which he has been ordered to pay is really due from him. In *Jagannath v. Mahesh Chandra Pal* (1) it was held that if the requisition under section 34(c) be not in conformity with section 34(d) no fine can validly be imposed on the guardian for failure to comply therewith. The same principle will apply in case of the failure of the guardian to pay a sum which he may be called upon to pay under sub-section (3) of section 41 of the Act. I am, therefore, of opinion that the order being one without any enquiry as regards the amount actually payable by the appellant was improper. The learned District Judge seems to be of opinion that it was immaterial as to who had realized the unrealized rents for which the appellant was made liable. In my opinion it will be inequitable to make the guardian pay any sum for which she was made liable on account of non-realization from tenants and which realizations were subsequently made by the new guardian. I would, therefore, set aside the order of the District Judge, dated the 22nd December, 1923, imposing the fine upon the appellant and direct that her objection dated the 4th October, 1923, be considered. In her petition of objection of that date she stated that the fact of the realization of the unrealized rents would appear from

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the account papers of Mr. Saiyid Ahmed Nāwab. The enquiry will therefore be limited to the papers of Mr. Saiyid Ahmed Nawab. If the village papers kept by the village *amlas* during the period of the guardianship of Mr. Ahmed Nawab or the accounts produced by him in Court show any realization from tenants or *thikadars* for the period for which Abbasi Begum was made liable, such realizations must be credited in favour of Abbasi Begum and she must be called upon to pay only the balance left after giving credit for such realizations.

The result is that the appeal is allowed and the order of the District Judge is set aside with costs.

MULLICK, J.—I agree. If Mr. Ahmed Nawab has by arrangement realized part of the balance of Rs. 1,475 due from the appellant it cannot be said that there has been failure on her part to pay the sum of Rs. 1,475. Therefore a fresh notice must issue for the sum really due.

Appeal allowed.

APPELLATE CIVIL.

Before Das and Ross, J.J.

BANSHIDHAR SHARAFF

v.

THAKUR ASHUTOSH DEO.*

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Birbhum Ghatwali Tenure—Inalienability of—Birbhum Ghatwali Regulation, 1829 (Regulation XXIX of 1829)—Commutation of ghatwali service, effect of—Santal Parganas Rural Police Regulation, 1910 (Regulation IV of 1910).

It is only the duty of supporting the police imposed by section 1 of the Birbhum *Ghatwali* Regulation, 1829, which

* Appeal from Original Order no. 269 of 1923, from an order of B. Bhabadev Sarkar, Subordinate Judge of the Santal Parganas, dated the 16th of January, 1923.