

**REVISIONAL CRIMINAL.***Before Bhide and Currie JJ.*

ALLAH RAKHI AND ANOTHER—Petitioners

*versus*

KARAM ILAHI—Respondent.

1933

*May 23.***Criminal Revision No. 1532 of 1932.**

*Criminal Procedure Code, Act V of 1898, Section 488: Claim for Maintenance for minor daughters—in lawful custody of divorced mother—Muhammadan Law—whether husband can demand custody of daughters as condition precedent to maintaining them.*

*Held*, that where the children are in the custody of their mother and she is their lawful guardian, they are entitled to claim maintenance from their father while living with the mother.

*Hence*, where the parties are governed by Muhammadan Law and the mother, though divorced, is thus the natural guardian of her daughters. until they attain the age of puberty, the father cannot demand the custody of the daughters as a condition precedent to maintaining them.

*Mussammatt Sarfraz Begam v. Miran Bakhsh* (1), *Mussammatt Zauhra Bi v. Mohammad Yusuf* (2), and *Emperor v. Ayshabai* (3). followed.

*Man Singh v. Mst. Dharmon* (4), *Sardar Muhammad v. Nur Muhammad* (5), and *Sultan v. Mahtab Bibi* (6), distinguished.

Other cases referred to.

*Case reported by K. B. Sheikh Din Muhammad, Sessions Judge, Jhelum.*

BADRI NATH, for DEWAN MEHR CHAND, for Petitioners.

GHULAM MOHY-UD-DIN, for Respondent.

(1) (1928) I. L. R. 9 Lah. 313.

: 1928 A. I. R. (Lah.) 543.

(2) 1930 A. I. R. (Lah.) 1043.

(3) (1904) 6 Bom. L. R. 536.

(4) 18 P. R. (Cr.) 1894.

(5) 22 P. R. (Cr.) 1917.

(6) (1926) 98 I. C. 391.

## REPORT OF THE SESSIONS JUDGE.

1933

*The proceedings are forwarded for revision on the following grounds:—*

ALLAH RAKHI  
v.  
KARAM ILAHI.

Out of the two daughters one is 10 years old and the other 7. Both have been contracted in marriage by their father during their infancy. The mother is entitled to the custody of her daughters till they attain puberty and the father is bound under Law to maintain them. This has been clearly laid down in *Mus-sammatt Sarfraz Begum v. Miran Bakhsh* (1). In that case "an application had been filed under section 488, Criminal Procedure Code, by a Muhammadan infant daughter through her mother, her legal guardian, against her father, who was willing to maintain the child if her custody was given to him. It was held that the child was entitled to an order for maintenance against her father while living with her legal guardian."

The offer of the respondent to maintain his daughters, if they are handed over to him, is therefore no reply to this application and the order of the learned Magistrate appears to me to be both illegal and harsh. The respondent's means of living are that he is the only son of an agriculturist, who owns a considerable area. After divorcing his former wife he has married another. Consequently he cannot plead lack of means, when called upon to maintain his off-spring by a discarded wife. Under the circumstances of the case a sum of Rs. 8 per mensem should be paid by him towards the maintenance of his daughters and I recommend that the order of the learned Magistrate be set aside accordingly.

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(1) 1928 A. I. R. (Lah.) 543.

1933

ALLAH BAKHI

v.

KARAM ILAHI.

BROADWAY J.

*Order of Broadway J., dated 3rd February 1933, referring the case to a Division Bench.*

BROADWAY J.—It has been repeatedly held that a father can only be called on to maintain his minor children if it is found that he neglects or refuses to do so. Here there is no question of neglect and the father has not refused. On the other hand in *Mussammatt Sarfraz Begum v. Miran Bakhsh* (1), *Mussammatt Zauhra Bi v. Mohammad Yusuf* (2), Jai Lal J. has held that a father can be called on to maintain his children if they are living with their lawful guardian. There seems to be some conflict of opinion on the point and I accordingly refer the case to a Division Bench.

#### ORDER OF THE DIVISION BENCH.

BHIDE J.

BHIDE J.—This is a petition for revision arising out of an application for maintenance under section 488, Criminal Procedure Code. The application was made on behalf of two minor daughters of the respondent Karam Ilahi—aged about 7 and 10 years. The girls are living with their mother, who has been divorced by the respondent. The respondent offered to maintain the girls if they were entrusted to his custody. The trial Magistrate held that in view of this offer, respondent could not be said to have 'refused to maintain' the daughters within the meaning of the provisions of section 488, Criminal Procedure Code. In support of this view he relied upon *Man Singh v. Mst. Dharmon, etc.* (3), *Ralla and Kartara v. Mst. Atti* (4), *Sultan v. Mahtab Bibi* (5). The application was accordingly dismissed. A petition for revision was presented to the Sessions Judge who held [following *Mussammatt Sarfraz Begam v. Miran Bakhsh* (1)], that the mother being the lawful

(1) 1928 A. I. R. (Lah.) 543:

I. L. R. 9 Lah. 313.

(2) 1930 A. I. R. (Lah.) 1043.

(3) 18 P. R. (Cr.) 1894.

(4) 115 P. L. R. 1914.

(5) (1926) 93 I. C. 391.

guardian of the daughters under the Muhammadan Law till they attain the age of puberty, the respondent was bound to maintain them, even while they were in the custody of the mother. He accordingly forwarded the petition to this Court with a recommendation that the order of the learned Magistrate be set aside and the applicants be awarded a sum of Rs. 8 per mensem by way of maintenance. The petition came up at first before a Single Judge, but has been referred by him to a Division Bench as he thought that there was some conflict of authorities on the point involved.

I may state at the outset that it is not suggested that the respondent's offer to maintain his daughters, if they are entrusted to his custody, is not *bonâ fide*, and I shall assume for the purposes of this petition that it is a *bonâ fide* offer. The question of law for consideration is whether such an offer is a good answer to an application for maintenance under section 488, Criminal Procedure Code, on behalf of minor children who are in the custody of their lawful guardian. The contention of the learned counsel for the respondent is that there is a provision in section 488 entitling the wife to refuse to live with her husband on certain grounds when the husband offers to maintain her, if she lives with him; but there is no such provision in the case of children and this shows that children cannot claim any pecuniary allowance under section 488, Criminal Procedure Code, from their father, when he offers to maintain them provided they live with him. The learned counsel further contended that a criminal Court is not concerned with questions of guardianship and for the purposes of section 488, Criminal Procedure Code, it is immaterial whether the children are

1933

ALLAH RAKHI

v.

KARAM ILAHI.BHIDE J.

1933

ALLAH RAKHI

v.

KARAM ILAHI.

BHIDE J.

living with their lawful guardian or otherwise and whether the father is entitled to their custody. In support of these contentions the learned counsel mainly relied on *Man Singh v. Mst. Dharmon, etc.* (1), and certain later rulings of the Punjab Chief Court in which that ruling was followed, *viz. Abdulla v. Mst. Zainab* (2), *Ralla and Kartara v. Mst. Atti* (3), *Sardar Muhammad v. Nur Muhammad* (4), and two rulings of this Court reported as *Sultan v. Mahtab Bibi* (5), *Jagan Nath v. Koshallia Devi* (6). He further submitted that two recent rulings of this Court, *viz. Mussamat Sarfraz Begum v. Miran Bakhsh* (7), and *Mst. Zauhra Bi v. Muhammad Yusaf* (8), in which a different view was taken, do not lay down the law correctly.

As regards *Man Singh v. Mst. Dharmon, etc.* (1) which has been followed in most of the Punjab rulings relied upon by the respondent, it would appear from a perusal thereof that the learned Judges in arriving at their conclusion that the father in that case could not be held to have refused to maintain the children did not ignore the question of guardianship, but actually took into consideration the fact that he was their lawful guardian under the Hindu Law (by which the parties to that case were governed) and as such entitled to their custody. They observed as follows:—

“As to the two minor sons, we are of opinion that they are not entitled to an order for separate maintenance on this application by order of a Criminal Court under section 488, Criminal Procedure Code.

(1) 18 P. R. (Cr.) 1894.

(5) (1926) 98 I. C. 391.

(2) 5 P. L. R. 1904.

(6) (1927) A. I. R. (Lah.) 430.

(3) 115 P. L. R. 1914.

(7) (1928) I. L. R. 9 Lah. 313:

(4) 22 P. R. (Cr.) 1917.

1928 A. I. R. (Lah.) 543.

(8) 1930 A. I. R. (Lah.) 1043.

A father is *primâ facie* the guardian of his minor children and entitled to their custody as well as to that of his wife, and he is not under an obligation to make them a money allowance for their maintenance apart from himself merely because he is the husband, or the father, and by refusing to do so he does not refuse to maintain them."

But the position might be different, where the father is not the guardian of the children and this fact is recognised by the learned Judges as would appear from the following remarks which appear in the judgment:—

"It is competent to the mother to apply to the Court under Act VIII of 1890 to give her the guardianship of the children which can only be done on proof that the father is an unfit person and when this has been done and the father refuses to make an allowance for a child, it may be that she can resort to section 488, Criminal Procedure Code."

It is thus clear that the learned Judges who decided *Man Singh v. Mst. Dharmon, etc.* (1) did not mean to lay down that even in cases where the mother is the lawful guardian of the children and they are living with her, the father is within his rights in offering to maintain them only if they are entrusted to his custody.

In all the later Punjab Chief Court cases on which the learned counsel for the respondent has relied, it appears that the father was the guardian and hence all those cases are clearly distinguishable on this ground. As regards the two rulings of this Court on which he has relied, *viz Sultan v. Mahtab Bibi* (2),

1933

ALLAH RAKHI

v.

KARAM ILAHI.

BHIDE J.

(1) 18 P. R. (Cr.) 1894.

(2) (1926) 98 I. C. 391.

1933

ALLAH BAKHI

v.

KARAM ILAHI.

BHIDE J.

and *Jagan Nath v. Koshallia Devi* (1) the former was decided on the report of the Sessions Judge without hearing any arguments. The case of children is dealt with very briefly and most of the rulings relied on therein appear to relate to cases where the father was the lawful guardian of the children and as such entitled to their custody. In *Jagan Nath v. Koshallia Devi* (1) also the order is very brief and contains no discussion of the point raised before us. The case related to Hindus and the father was apparently the lawful guardian. There is a remark in the report of the Sessions Judge that the father had applied for the custody of the daughters and the application had been dismissed. But it is not clear on what grounds it was dismissed. In any case it does not appear from the report that the mother had been actually appointed a guardian of the daughter who was living with her. There was moreover a definite finding of fact by the Magistrate that the father had not neglected or refused to maintain the daughter.

The Punjab cases relied on by the learned counsel for the respondent thus do not help him. On the other hand the two recent rulings of this Court which have been relied upon on behalf of the petitioners, *viz.* *Musammatt Sarfraz Begum v. Miran Bakhs* (2) and *Mst. Zauhra Bi v. Muhammad Yusuf* (3) are in point and are clearly against him. It was held in these rulings that where the children are in the custody of their mother and she is their lawful guardian, they are entitled to claim maintenance from their father while living with the mother. *Man Singh v. Mst. Dharmon* (4), which is the mainstay of the argument of the

(1) 1927 A. I. R. (Lah.) 430.

(3) 1930 A. I. R. (Lah.) 1043.

(2) (1928) I. L. R. 9 Lah. 313.

(4) 18 P. R. (Cr.) 1894.

learned counsel for the respondent as well as *Sardar Muhammad v. Nur Muhammad* (1), were carefully considered and distinguished in one of these rulings *Mussammatt Sarfraz Begam v. Miran Bakhsh* (2).

The learned counsel for the respondent was not able to cite a single decision of any other Chief Court or High Court in India in support of his argument, while the view taken in *Mussammatt Sarfraz Begum v. Miran Bakhsh* (2), is supported by the following decisions of the Bombay and Madras High Courts and the Chief Court of Burma. *Emperor v. Ayshabai* (3), (which was followed in *Mahomed Jusab Haji Adam Nurani v. Haji Adam Haji Usman Nurani* (4), *In re Parathy Valappil Moideen* (5) and *Murgesan Mudaliar v. Sodianma* (6). The facts in *Emperor v. Ayshabai* (3) are practically on all fours with those of the present case.

The mere fact that section 488, Criminal Procedure Code, contains a *proviso* entitling the wife to refuse to live with the husband on certain grounds while there is no such provision in the case of children does not seem to be of much significance. The minor children cannot be expected to have any voice in the matter and the law will presume that for the sake of their welfare they should be in the custody of their lawful guardian, *i.e.* their guardian under the personal law, or a guardian appointed by a competent Court, if any. In the present instance it is not disputed that the mother, though divorced, is the guardian of the daughters under the Muhammadan Law by which the parties are governed as the daughters have

1933

ALLAH BAKHI  
v.  
KARAM ILAHI.

BEIDE J.

(1) 22 P. R. (Cr.) 1917.

(4) (1913) I. L. R. 37 Bom. 71.

(2) (1928) I. L. R. 9 Lah. 313.

(5) (1913) 21 I. C. 469.

(3) (1904) 6 Bom. L. R. 530.

(6) (1915) 30 I. C. 480.

1933

ALLAH RAKHI

v.

KARAM ILAHI.

BHIDE J.

not yet attained the age of puberty. It was urged that the mother may be disqualified to be the guardian in certain circumstances (*vide* Para. 258 of Mulla's Principles of Muhammadan Law). But, if she is so disqualified, it is open to the respondent to move a competent court to appoint him or some one else as the guardian of the daughters. Until he does so, she is the natural guardian and there is nothing in the provisions of section 488, Criminal Procedure Code, to show that he is entitled to demand the custody of the daughters from their lawful guardian as a condition precedent to maintaining them. To place any such construction on that section is in fact likely to defeat its object. For in that case a father may easily be able to escape liability for the maintenance of his children by the simple device of demanding their custody, when he knows full well that owing to their infancy or other reasons the mother would be unwilling to entrust them to his care. It is true that it is not the function of a criminal Court to decide questions as regards the right to guardianship of children, but there is no reason why it should not take notice of the fact that the mother is (as in this case) their lawful guardian under the personal law and that the father is not *prima facie* entitled to demand their custody. In my opinion an offer by a father to maintain the children provided they are entrusted to his custody in such circumstances, is tantamount to a refusal to maintain them within the meaning of the provisions of section 488, Criminal Procedure Code, as held in *Emperor v. Ayshabai* (1). I would accordingly accept the recommendation of the learned Sessions Judge and setting aside the order of the learned Magistrate

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(1) (1904) 6 Bom. L. R. 536.

direct the respondent to pay Rs. 8 per mensem to the petitioners by way of maintenance with effect from the date of the application (10th May 1932).

CURRIE J.—I concur.

N. F. E.

1933

ALLAH RAKHI

v.

KARAM ILAHI.

BHIDE J.

*Revision accepted.*

### APPELLATE CIVIL.

*Before Bhide J.*

ALLAHABAD BANK, LTD. (PLAINTIFF)

Appellant

*versus*

RAJA RAM AND OTHERS (DEFENDANTS)

Respondents.

1933

May 12.

Civil Appeals Nos. 253 and 283 of 1933.

*Civil Procedure Code, Act V of 1908. Order XL, rule 1: Receiver ad-interim — appointment of — by Delhi Court — in partition suit — whether bars subsequent appointment by Lahore Court in mortgagee's suit in respect of the same property — Section 151: Inherent powers — exercise of — where other remedy is open to appellant—Section 24: Transfer of suit from Delhi to Lahore—by High Court—Suo moto—in interests of justice.*

Considerable delay took place in the hearing of the suit by the appellant-Bank on the basis of an equitable mortgage, and its application for the appointment of an *ad-interim* Receiver (both instituted in Lahore in 1930), owing to the tactics employed by the mortgagor-defendants, a Joint Hindu family of four brothers and their sons and nephews, the latter of whom instituted a suit for partition of the family properties in a Court at Delhi in August 1932 and succeeded in getting a Receiver appointed in that suit by consent of parties, in October 1932, who was given charge of all the joint family property situate at Lahore including that in the mortgage suit. When the mortgagee-Bank's petition for appointment of an *ad-interim* Receiver came on for final hearing at Lahore