APPELLATE CIVIL.

Before Bhide J.

1933

Dec. 14.

MUSSAMMAT PREM KAUR AND OTHERS—Appellants

versus

BANARSI DAS—Respondent.

Civil Appeal No. 746 of 1933.

Guardians and Wards Act, VIII of 1890, Section 25: Custody of illegitimate child—removed by mother from custody of father—Father's application under section 25—competency of—Hindu Law—Mother, whether 'lawful guardian.'

On an application by B. D. under section 25 of the Guardians and Wards Act for custody of his three children by *Mussammat* P., who had been living with him as his mistress for 16 years, the District Judge granted the application only in respect of the eldest of the three children, a boy aged about 10, as it would be for his welfare. *Mussammat* P. who had left petitioner's house in his absence and taken her children with her without petitioner's permission appealed to the High Court against the District Judge's order and it was contended that as the children were illegitimate on the father's own admission, the mother, and not he, was their lawful guardian.

Held, that it had not been established that under Hindu Law the appellant, as the mother of illegitimate children, was their lawful guardian and this applied equally to the putative father, but as it was the latter, and not the mother, on whom the obligation to maintain falls, he should *primâ facie* have a preferential right to custody.

Barnardo v. *Mac Hugh* (1), and *Ghana Kanta Mohanta* v. *Gereli* (2), relied on.

Venkamma v. *Savitramma* (3), *In the matter of Saithri* (4), and *Bhudher Singh* v. *Sahamat* (5), distinguished.

(1) 1891 L. R. A. C. 388.
(2) (1905) I. L. R. 32 Cal. 479.
(3) (1889) I. L. R. 12 Mad. 67.
(4) (1892) I. L. R. 16 Bom. 307.
(5) 1925 A. I. R. (Oudh) 282.

1933

MUSSAMMAT PREM KAUR v. BANARSI DAS.

Held also, that as the position of the appellant in this case was at least that of a concubine who lived with the respondent for a number of years, the ordinary rule giving the father the rights of guardianship would apply.

Gour's Hindu Law, para. 960, referred to.

Held however, that for the purposes of section 25 of the Guardians and Wards Act it is not really necessary that the applicant should be a *lawful* guardian under the personal law. The application can be made by a 'guardian' of his person and the word 'guardian' as defined under the Act means any "person having the care of a minor or of his property or of both his person and property," and that would apply to the respondent in this case.

Held lastly, that the sole criterion for decision being the welfare of the minor, as laid down in section 25, the respondent had been rightly appointed guardian of the boy and that the appeal must be dismissed.

Miscellaneous first appeal from the order of Mr. M. M. L. Currie, Additional District Judge, Lahore, dated the 28th April, 1933, ordering that the boy Kuldip be restored to the custody of Rai Bahadur *Banarsi Das, as soon as he has given evidence in the case now pending in the Court of* Thakar *Vikram Singh, while the two minor children will remain with their mother*, Mussammat *Prem Kaur*.

HARNAM SINGH and RAM SARAN, for Appellants.

DEWAN RAM LAL and RAM LAL ANAND II, for Respondent.

BHIDE J.—This appeal arises out of a petition under section 25 of the Guardians and Wards Act by *Rai Bahadur* Banarsi Das, a rich mill owner of Ambala, for the custody of three of his children by *Mussammat* Prem Kaur who, he alleged, lived with him as his mistress or concubine for about sixteen years since 1916. Recently differences arose between the petitioner and *Mussammat* Prem Kaur with the

BHIDE J.

1933

MUSSAMMAT PREM KAUR v. BANARSI DAS.

BHIDE J.

result that in November, 1932, the latter left Ambala for Lahore in his absence without his permission, with the three children and their governess Mrs. Moran. The petitioner having subsequently failed to obtain the custody of the children, applied under section 25 of the Guardians and Wards Act for recovery of their custody. The learned District Judge has granted the application only in respect of the eldest of the three children, a boy, named Kuldip, aged about 10, on the ground that "it would be for his welfare that he should be restored to the custody of his father, where he will have a chance of getting properly educated." From this decision *Mussammat* Prem Kaur has appealed.

Two main points were urged on behalf of the appellant, *viz.*—

(1) That *Rai Bahadur* Banarsi Das had no *locus standi* to present the application under section 25 to the Guardians and Wards Act, as the children being on his own admission "illegitimate" *Mussammat* Prem Kaur, the mother, and not he, was their lawful guardian; and (2) that it has not been shown that it was necessary for the welfare of the boy Kuldip to hand him over to the custody of the petitioner.

The first point is the most important one arising in the case and lengthy arguments have been addressed thereon. There is no doubt that in books on Hindu Law we find it generally stated that the mother is the guardian of her illegitimate children, but so far as I have been able to discover, the only authorities referred to therein in support of this proposition are *Venkamma* v. *Savitramma* (1) and *In the matter of Saithri* (2). (*See* Mayne's Hindu Law, 9th edition,

(1) (1889) I. L. R. 12 Mad. 67. (2) (1892) I. L. R. 16 Bom. 307.

page 294, Mulla's Hindu Law (1931), page 559, Gour's Hindu Code, 2nd edition, page 498, Rama Krishna's Hindu Law, Volume II, page 412). No text from any of the old sources of Hindu Law appears to be referred to anywhere in support of it. The authorities referred to above, *viz. Venkamma* v. *Savitramma* (1) and *In the matter of Saithri* (2) do not, however, contain any discussion of the respective rights of the father and mother as regards the guardianship of their illegitimate children. In both these cases, the mother was claiming guardianship of her illegitimate child as against third parties to whom the care of the children had been entrusted and not against the father and hence there was no occasion to consider the relative rights of the father and the mother. The only authority cited by the learned counsel for the appellant, which might be said to be in point to some extent, is a ruling of the Chief Court of Lower Burma, reported as *Ma Mya* v. *Felix Slym* (3). The personal law of the children concerned in that case was considered to be obscure and the case was decided on the equitable principles of English law. It was remarked that under English law, an illegitimate child is regarded as nobody's child and neither the father nor the mother has any absolute right to the custody of their illegitimate children, but it was also held on the authority of the well-known case *Barnardo* v. *Mac Hugh* (4), decided by the House of Lords, that the desire of the mother of an illegitimate child was primarily to be considered in the matter of its custody. In the Burma case there was nothing against the character of the mother, while the father was said to be living in adultery. Consequently the father's peti-

(1) (1889) I. L. R. 12 Mad. 67.
(2) (1892) I. L. R. 16 Bom. 307.
(3) (1912) 17 I. C. 926.
(4) 1891 L. R. A. C. 388.

1933

MUSSAMMAT PREM KAUR v. BANARSI DAS.

BHIDE J.

tion to be appointed a guardian was dismissed. Now taking this authority at its best, it does not establish that the mother is the *lawful guardian* of her illegitimate children. All that it says is that her desire as to their custody should be primarily considered. A reference to the case *Barnardo* v. *MacHugh* (1), will show that there also the contest was between the mother of an illegitimate child and a third party. That case arose out of a petition for a writ of *habeas corpus* and was decided according to rules of equity, which established that the wishes of the blood-relations, *viz.* the mother, the putative father, and the relations on the mother's side were entitled to consideration [*vide Reg.* v. *Nash* (2) and *Barnardo* v. *MacHugh* (1)]. It is not clear whether the putative father of the boy was alive but in any case he did not appear and there was no occasion to consider his claims or wishes. The question whether the mother was entitled to guardianship according to common law also did not arise in that case and the case was decided according to rules of equity. The proposition was advanced in that case that the mother of an illegitimate child has the same rights as the father of legitimate children, but this position was not accepted (*vide* pp. 394 and 396-397). It was remarked in the course of the judgment (though the point was not decided) that the obligation cast upon the mother to maintain her illegitimate children till the age of 16 under the Poor Laws Act would involve a corresponding right to custody [*vide Barnardo* v. *MacHugh* (1), pp. 395, 398] and the old view that an illegitimate child was *filius nullius* and therefore the mother has no right to its custody cannot be maintained. According

(1) 1891 L. R. A. C. 388, 391. (2) (1882) 10 Q. B. D. 454.

to Hindu Law, however, it is the father and not the mother on whom the obligation to maintain falls and even this consideration will not help the appellant [See *Ghana Kanta Mohanta* v. *Gereli* (1)].

It seems to me, therefore, that none of the authorities cited really establish that the appellant as the mother of "illegitimate" children is their 'lawful guardian.' As regards the position of the putative father also, no direct authority has been cited, but if the obligation to maintain gives a right to custody as remarked in *Barnardo* v. *MacHugh* (2), referred to above, the father on whom the obligation falls under Hindu Law should *primâ facie* have a preferential right. It may be further pointed out in this connection that even under statutory law in India the father is held responsible for the maintenance of his illegitimate children (*cf.* section 488, Criminal Procedure Code).

Lastly, as pointed out by the learned District Judge, it must be remembered that the position of the appellant in this case was at least that of a concubine who lived with him for a number of years and in such a case the ordinary rule giving the father the rights of guardianship would according to Sir Hari Singh Gour prevail (*vide* Gour's Hindu Code, para. 960).

I have discussed above at some length the question of the legal rights of a mother of illegitimate children under the personal law, because much stress was laid on it in arguments. As stated above I do not think the authorities relied on establish that the appellant, and not the respondent, was the lawful guardian of Kuldip under the circumstances of the case. But for the purposes of section 25 of the Guardians and Wards

(1) (1905) I. L. R. 32 Cal. 479. (2) 1891 L. R. A. C. 388.

1933

MUSSAMMAT PREM KAUR v. BANARSI DAS.

BHIDE J.

Act, it is not really necessary that the applicant should be a "lawful guardian" under the personal law. The application can be made by a "guardian" of his person, and the word "guardian" as defined in the Act means any "person having the care of the person of a minor or of his property or of both his person and property." Now there can be no doubt on the evidence on the record that the petitioner had the care of the person of the boy Kuldip till he was removed to Lahore in November, 1932. The evidence shows that the appellant was living amicably with the petitioner till then like a wife and Kuldip, who was also living with him, was entrusted to the care of a governess engaged by the petitioner and was being brought up in a manner befitting his position. The appellant's own position in this case was that she was not a mistress but was lawfully married to the petitioner and in view of this, the contention of the learned counsel for the appellant that the petitioner was only bringing up the boy on behalf of the appellant seems to be without any foundation. It seems to me therefore clear that the petitioner was a 'guardian' of the person of the boy within the meaning of section 25 and has a *locus standi* to maintain the present petition under that section. The learned counsel for the appellant urged that the petitioner could not recover the custody of the boy from the appellant as she was his lawful guardian and relied upon *Bhuder Singh* v. *Sahamat* (1). But, as pointed out above, it seems to me that there is really no authority to sustain the proposition that the appellant as the mother is the lawful guardian of Kuldip and consequently the authority cited cannot help the appellant.

(1) 1925 A. I. R. (Oudh) 282.

1933

MUSSAMMAT PREM KAUR v. BANARSI DAS.

BHIDE J.

As regards the merits of the case, the application must be decided on equitable considerations—the sole criterion for decision being the welfare of the minor, as laid down in section 25 of the Guardians and Wards Act. As to this point, there is no doubt that the petitioner is financially in a far better position to arrange for the education of the boy who is now over 10 years of age and is not too young to be taken away from the care of his mother. The boy was produced as witness and deposed that he preferred to remain with his mother and that he was afraid of being maltreated or killed if he were entrusted to the petitioner. But the learned District Judge, who examined this witness, got the impression that the boy, who was then in the custody of the appellant, had been carefully tutored. After carefully considering his evidence in the light of all the facts on the record, I agree with the opinion of the learned District Judge. The evidence of Mrs. Moran which appears to be reliable, goes to show that the petitioner was devoted to his children and was taking proper care of them and there seems to be really no reasonable ground for apprehending any harm to Kuldip by being entrusted to his care. On the other hand, there is every likelihood of his being educated in a far more suitable manner than if he were left with the appellant. It was frankly stated before me by the learned counsel for the appellant that she should have had no objection to entrusting the boy to the care of the petitioner, if he had recognised her as his lawful wife and it seems perfectly clear that her opposition to the present application proceeds not from any genuine regard for the welfare of the boy or any apprehension of harm to him but from a desire to put pressure upon the petitioner to recognise her own claims.

I dismiss the appeal with costs.

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Shadi Lal C. J. and Rangi Lal J.

1934

Jan. 22.

MUSSAMMAT CHANDAN AND ANOTHER (DEFENDANTS) Appellants

versus

KHUSHAL SINGH AND OTHERS (PLAINTIFFS) AND SHARAM SINGH AND OTHERS (DEFENDANTS) } Respondents.

Civil Appeal No. 59 of 1929.

Custom—Succession—Ancestral property—Dhotar Jats *of village Vinni*—Tahsil *Hafizabad—district Gujranwala—Sisters or Collaterals*—Riwaj-i-am.

Held, that according to the custom applicable to the *Dhotar Jats* of village Vinni, *tahsil* Hafizabad, district Gujranwala, as recorded in the *Riwaj-i-am*, sisters cannot succeed to the ancestral property of their brother in the presence of collaterals. Sisters and their issue are usually excluded by agnates however distant.

Riwaj-i-am, Gujranwala district, answer to question No. 55, relied upon.

First appeal from the decree of Sayyad *Abdul Haq, Senior Subordinate Judge, Gujranwala, dated 2nd November, 1928, granting a declaration to the effect that the plaintiffs and defendants Nos. 3 to 14 are in possession of the land in suit as owners being the lawful heirs of Ram Chand, deceased, to the exclusion of defendants 1 and 2.*

MUKAND LAL PURI and QABUL CHAND, for Appellants.